Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ARTHUR JOHNSON, individually and on behalf of all persons similarly situated,
Petitioner,

v.

AMERICAN AIRLINES, INC.,
Respondent.

Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District

---

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Can airlines and passengers enter into enforceable ticket contracts, or is any effort to enforce such contracts preempted by the Airline Deregulation Act of 1978?

LIST OF PARTIES

This case was initiated as two class actions, which were consolidated on appeal. The petitioner in the first case is Arthur Johnson, and the respondent is American Airlines, Inc. The petitioners in the second case are Bernard Baskin and Marilyn Baskin, and the respondent is United Airlines, Inc.

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Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District

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PETITION FOR WRIT OF CERTIORARI

Petitioners Arthur Johnson, Bernard Baskin and Marilyn Baskin respectfully pray that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, First District, entered in this case on April 22, 1994.

OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, is reported at 261 Ill. App. 3d 622, 633 N.E.2d 978 (1st Dist. 1994), and is reproduced in the Appendix to this Petition (App.) at 1a. The order of the Supreme Court of Illinois denying discretionary review of

this case is reported at 157 Ill. 2d 503, —— N.E.2d —— (Ill. 1994), and is reproduced at App. 10a.

STATEMENT OF JURISDICTION

This petition has been filed within 90 days following the denial, on October 6, 1994, of discretionary review by the Supreme Court of Illinois (App. 10a). The opinion of the Appellate Court of Illinois, First District, was issued on April 22, 1994 (App. 1a). The petitioners' Petition for Rehearing in the Appellate Court was denied on May 26, 1994 (App. 7a). By order dated October 18, 1994 (App. 11a), the Illinois Supreme Court stayed the issuance of the mandate in this case, pending the filing of this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

Two provisions of the Federal Aviation Act of 1958 (the "Act") are relevant to this appeal: (1) section 1305(a)(1), which was added by the Airline Deregulation Act of 1978 (the "ADA") and, (2) section 1506, which has been a part of the Act since its inception. These statutes provide, in pertinent part:

> **§ 1305. Federal preemption**
>
> (a) Preemption. (1) . . . [N]o State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier . . . .
>
> 49 U.S.C. Appx. § 1305(a)(1).
>
> **§ 1506. Remedies not exclusive**
>
> Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.
>
> 49 U.S.C. Appx. § 1506.

STATEMENT OF THE CASE

The court below has held that a passenger cannot sue an airline for breach of a ticket contract, and affirmed the final dismissal of two class action cases. In so doing, the lower court effectively interpreted this Court's opinion in *Morales v. Trans World Airlines, Inc.*, 504 U.S. ——, 119 L.Ed.2d 157 (1992), to mean that *all* ticket contract claims by passengers against airlines are preempted.

Review of the decision below is urgently needed. In direct conflict with the stated policy of the United States Department of Transportation (USDOT), and with a decision of the United States Court of Appeals for the Ninth Circuit, the court below has held that the keystone of free market commercial relations—the enforceability of contracts—was destroyed by the ADA. According to the lower court, airlines (and, presumably, passengers) are free to breach ticket contracts with impunity under the aegis of an overblown interpretation of preemption.

While straightforward breach of contract claims were not at issue in *Morales*, such claims are currently under review in another case now pending before this Court, *American Airlines, Inc. v. Wolens*, No. 93-1286 (October Term, 1993). This Court's decision in *Wolens* will almost certainly control the result in the instant case. For this reason, this Court should defer consideration of the instant case pending its ruling in *Wolens*. Otherwise, potentially millions of airline passengers will be subjected to the extinguishment of valid claims for breach of contract.

A. Background

This is a case for breach of airline ticket contracts. This consolidated [1] class action challenges two airlines' collection of a transportation tax in addition to refund

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[1] By order dated October 6, 1993 (App. 8a), the Appellate Court consolidated the petitioners' cases.

penalties on airline fares. The gravamen of petitioners' complaints in both cases is that the airline respondents contractually agreed to charge refund penalties of 25% of the fare, but collected penalties of 27% of the fare. Petitioners claim that, by including a federal tax in the calculation of the refund penalties, the airlines breached a contract to charge a penalty of "*25% of the fare*". JC490-91; BC 190, ¶¶ 7 & 8.[2]

B. The Impact of *Morales*

After this Court issued its decision in *Morales v. Trans World Airlines, Inc.*, 504 U.S. ——, 119 L.Ed. 2d 157 (1992), respondent American Airlines, Inc. (American) filed a motion for summary judgment, and respondent United Airlines, Inc. (United) filed a motion to dismiss, both of which contended that: (1) *Morales* compelled the conclusion that petitioners' claims were preempted, as a matter of law, by the ADA (49 U.S.C. Appx. § 1305(a)(1)) and, (2) various other grounds existed to dismiss the petitioners' claims. JC421-442; BC641. The trial courts, relying exclusively on the preemption analysis of *Morales*, held that petitioners' claims were preempted by the ADA's prohibition on state enforcement of any law "relating to rates . . . of any air carrier," and dismissed both cases. 49 U.S.C. Appx. § 1305(a)(1), App. 13a, 31a.

The Appellate Court, in affirming dismissal of these cases, relied principally upon *Morales, Statland v. American Airlines, Inc.*, 998 F.2d 539 (7th Cir. 1993), which summarily rejected similar claims in *obiter dicta*, and *Vail v. Pan Am Corp.*, 260 N.J. Super. 292, 616 A.2d 523 (1992), which held that the ADA preempted common law contract claims. App. 3a-5a. Although the de-

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[2] Citations to the records are abbreviated as follows: (1) For the record in *Johnson v. American Airlines, Inc.*, JC—— - refers to the page number of the Record on Appeal, (2) For the record in *Baskin v. United Airlines, Inc.*, BC—— - refers to the page number of the Record on Appeal.

cision of the Illinois Supreme Court in *Wolens v. American Airlines, Inc.*, 157 Ill. 2d 466 (1993), *cert. granted*, —— U.S. ——, 128 L.Ed.2d 69 (1994) (*Wolens*), had held that common law contract claims are not preempted, the Appellate Court summarily distinguished *Wolens*, and pointed out that this Court had granted certiorari in that case, the unarticulated assumption being that *Wolens* would be reversed by this Court. App. 6a.

REASONS FOR ALLOWANCE OF WRIT

In direct contravention of the stated policy of the USDOT, which is charged with the implementation of the ADA, the court below has held that passengers cannot enter into enforceable contracts for carriage on an airline. This holding is beyond the pale of any free market deregulatory scheme. For there will be no free market for airline tickets if airlines and passengers cannot rely on their contracts.

Application of the common law of contracts does not in any way interfere with an airline's rate-setting activity. The airlines here set the "rate" for their refund penalties. The petitioners accepted that rate, and a contract was formed. The airlines ultimately charged a rate different than the contract rate. In so doing, the airlines breached their contracts with the petitioners, and should be required to answer in damages for their breach.

Neither petitioners, nor the common law of contracts, has in any way interfered with the airlines' determination of their rates. *The airlines made their rate determination wholly without any interference from the law of any state.* The common law of contracts does not tell airlines what rate to charge. On the contrary, airlines are free to set rates in any manner they deem meet, without any regard for state law. But the law of contracts does state, permissibly, and consistent with the preemptive scope of the ADA, that *once an airline sets its rate, and a customer accepts it*, the parties can hold each other to the bargain struck.

The court below has effectively held that *all* state law claims by passengers against airlines are preempted by the ADA. The problem with this approach is that it proves too much—way too much. According to the airlines' tortured reading of the ADA, airlines are free to renege on contracts and, indeed, injure and kill passengers [3], without answering in damages to common law contract and tort claims. This approach defies common sense, and common law.

For a proper interpretation of the ADA, and *Morales*, inescapably leads to the conclusion that, once an airline has set its rate, and a customer accepts it, state common law can hold the airline to the rate *set by the airline*. This is the critical distinction missed by the airlines in claiming that airlines cannot be sued for breach of contract.

I. THE ADA DID NOT GIVE AIRLINES A LICENSE TO STEAL

The Appellate Court, the trial court and, indeed, some other courts, believe that *Morales* announced a change in the law of preemption of claims against airlines. But *Morales* did no such thing. That case did no more than confirm existing law, while clarifying the proper preemption analysis.

The lower court construed *Morales* to preempt *all* state laws, whether statutory or common law, affecting airlines in any way. That was not the holding of *Morales*. The holding of *Morales* was that an attempt by the National Association of Attorneys General to impose a detailed scheme of regulation on airline advertising, pricing and disclosure practices was preempted by the ADA. The

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[3] This is not a hypothetical concern. The United States Court of Appeals for the Fifth Circuit has held, albeit reluctantly, that injury claims against airlines are preempted by the ADA. *Hodges v. Delta Airlines, Inc.*, 4 F.3d 350 (5th Cir. 1993), *reh'g en banc granted*, 12 F.3d 426 (1994).

scheme of regulation in that case was extremely comprehensive, filling no less than 15 pages in the Supreme Court Reporter (119 L.Ed.2d at 173-189.) In striking down this blatant effort at state regulation of airline rates and services, this Court first noted that the purpose of the ADA was to replace strict federal regulation of airline pricing and services with "maximum reliance on competitive market forces." 119 L.Ed. 2d at 164. The ADA was enacted to replace regulation with competition. Obviously, if the states stepped in to fill the regulatory breach left by the federal government, this legislative purpose would be defeated. *Id.* Thus, section 1305 (a)(1) prohibits states from enforcing any laws "relating to" rates, routes or services. In *Morales*, this Court astutely construed the words "relating to" liberally, relying on a dictionary definition which interprets the words to mean "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with. . ." 119 L. Ed. 2d at 167.

The lower court's interpretation of *Morales* stretches the holding of that case beyond the breaking point. According to the lower court's reading of *Morales*, for example, Arthur Johnson, one of the petitioners here, could pay cash for a ticket to New York and, when he shows up at the boarding gate, *American could refuse to allow him to board, and refuse him any refund.* Johnson would have no claim for breach of contract, at least according to the lower court's strained reading of *Morales*.

While *Morales* appropriately construed the ADA as a free market charter for the airline industry, that case did not, by any stretch of the imagination, announce a return to the days of Robber Baron piracy. On the contrary, this Court was careful to limit its holding to the comprehensive regulatory scheme adopted by the Attorneys General:

> To adapt to this case our language in *Shaw*, '[s]ome state actions may affect [airline fares] in too tenuous,

> remote or peripheral a manner' to have pre-emptive effect. In this case, as in *Shaw*, '[t]he present litigation plainly does not present a borderline question, *and we express no views about where it would be appropriate to draw the line.*' 119 L.Ed. 2d at 171-72 (citations omitted, emphasis supplied.)

The airlines' tortured reading of *Morales* is that *there is no line to be drawn*, that states can do *nothing* which has any tangential effect on airline rates, routes or service. While this Court construed the ADA to displace government regulation with the Laws of the Free Market, the airlines choose to read the ADA as a return to the Law of the Jungle. This position is plainly contrary to *Morales*, and to the ADA.

A state's application of traditional contract law to an airline ticket certainly falls on the right side of the line suggested by *Morales*. Freedom of contract is, indeed, one of the cornerstones of free market commercial relations. Without enforceable contracts, there is no market.

II. THE LOWER COURT'S INTERPRETATION OF THE ADA CONFLICTS WITH THE DEFINITIVE INTERPRETATION BY THE USDOT

As the agency charged with implementation of the Act, the USDOT's interpretation of the ADA is entitled to substantial deference. *Massachusetts v. Morash*, 490 U.S. 107, 116-17 (1989). The USDOT has unequivocally expressed its commitment to the enforceability of airline ticket contracts, in both its actions before this Court, and in its regulations.

While the USDOT favors reversal of *Wolens* because of the broad statutory claims asserted in that case, the USDOT was careful to state its position that common law breach of contract claims are not preempted. Indeed, the bulk of the USDOT's amicus brief in *Wolens* is directed at establishing that the "competitive, market-driven

choices embodied in private contracts" are not displaced by the ADA. *American Airlines, Inc. v. Wolens*, No. 93-1286 (October Term, 1993), Brief For The United States As Amicus Curiae In Support Of Reversal, pp. 15-30, 16. The USDOT has expressed its determination, in no uncertain terms, that the sort of contract claims at issue in this case are not preempted.

And the USDOT has also expressly acknowledged the role of enforceable contracts in the context of cancellation penalties in its implementing regulations for the Act. Part 253 of Title 14 of the Code of Federal Regulations deals with notice of the terms of the contract of carriage for air transportation. 14 C.F.R. §§ 253.1 *et seq.* The stated purpose of the regulations is to set uniform standards for incorporation by reference of contract terms in ticket contracts, and they are explicitly preemptive of state laws on the same subject. 14 C.F.R. § 253.1. With respect to refund penalties, carriers are forbidden to incorporate by reference such terms, and restrictions on refunds and monetary penalties must be conspicuously printed on the ticket. 14 C.F.R. § 253.7. The effect of failure to follow these regulations is plainly expressed:

> *In addition to other remedies at law*, an air carrier may not claim the benefit as against the passenger of, and the passenger shall not be bound by, any contract term incorporated by reference if notice of the term has not been provided to that passenger in accordance with this part. 14 C.F.R. § 253.4 (emphasis supplied).

In adopting this implementing regulation for the ADA, the USDOT clearly contemplated that a passenger could seek "remedies at law" for an airline's breach of the contract of carriage relating to refund penalties. Thus, the fact that the instant case is not preempted by the ADA is confirmed by the very federal agency charged with implementing that statute.

III. THE DECISION BELOW CONFLICTS WITH THE NINTH CIRCUIT'S DECISION IN *WEST*

In *West v. Northwest Airlines, Inc.*, 995 F.2d 148 (9th Cir. 1993), *cert. den'd.*, 127 L.Ed. 2d 374 (1994), a breach of contract and tort case brought by a passenger who was "bumped" by an airline, the United States Court of Appeals for the Ninth Circuit determined that the passenger's claims were not preempted by the ADA, holding that:

> We believe that the state contract and tort laws under which West seeks relief are within the range of statutes too tenuously connected to airline regulation to trigger preemption under the ADA, what the *Morales* court called "borderline questions." 995 F.2d at 151.

The *West* court went on to buttress its conclusion by reference to the implementing regulations of the Act, specifically 14 C.F.R. § 250.9(b), where the USDOT interprets the Act to leave a bumped passenger with the option of seeking "damages in a court of law." The Ninth Circuit deferred to the interpretation of the USDOT, and allowed West's state-law claims for compensatory damages to proceed.

The opinion below in the instant case simply cannot be squared with the Ninth Circuit's holding in *West*, with *Morales*, or with the ADA. By holding that airlines and passengers cannot enter into enforceable ticket contracts, the court below has placed itself in direct conflict with the Ninth Circuit, and with the statutory scheme embodied in the Act. The Ninth Circuit recognized that enforceable contracts are the foundation of free market commerce. The court below did not.

CONCLUSION

This Court should defer consideraiton of this case pending its decision in *Wolens*, at which point certiorari should be granted, and the decision below summarily reversed, or vacated and remanded for reconsideration in light of *Wolens*. In the alternative, this case should be set for plenary consideration. Absent review by this Court, potentially millions of airline passengers will be left without a remedy, and the freedom of contract which supports our free market system will be gravely jeopardized.

Respectfully submitted,

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January 4, 1995

APPENDICES

APPENDIX A

[Filed April 22, 1994]

ILLINOIS APPELLATE COURT
FIRST DISTRICT

Nos. 1-93-1156
1-93-1214

ARTHUR JOHNSON, individually and on behalf of all persons similary situated,
Plaintiff-Appellant,

v.

AMERICAN AIRLINES, INC.,
Defendant-Appellee.

Appeal from the Circuit Court of Cook County
Honorable John Hourihane, Judge Presiding

BERNARD BASKIN and MARILYN BASKIN, individually and on behalf of all persons similarly situated,
Plaintiffs-Appellants,

v.

UNITED AIRLINES, INC.,
Defendant-Appellee.

Appeal from the Circuit Court of Cook County
Honorable Lester D. Foreman, Judge Presiding

JUSTICE McNULTY delivered the opinion of the court:

Plaintiff Arthur Johnson appeals from the entry of summary judgment on his class action breach of contract suit against defendant American Airlines, Inc. (American). Plaintiffs Bernard Baskin and Marilyn Baskin appeal the dismissal of their class action breach of contract claim against defendant United Airlines Inc. (United). These appeals were consolidated.

Plaintiff Johnson called an American Airline ticket agent and purchased a reduced fare ticket for $158, comprised of $146.30 for airline transportation and $11.70 for Federal transportation tax. Johnson claims that the American ticket agent told him that the penalty for cancelling the ticket was 25% of the fare. When Johnson cancelled the ticket, he was assessed a penalty of 25% of the total ticket price.

Johnson brought this class action claiming that American breached its oral contract by charging him a penalty of 25% of the total ticket price, rather than only the cost for transportation. Johnson claims he was therefore overcharged $3.14. The trial court granted defendant's motion for summary judgment on the basis that Johnson's claim relates to rates and services and is thus preempted under section 1305(a)(1) of the Airline Deregulation Act (ADA). (49 U.S.C. App. § 1305(a)(1).) This appeal followed.

The Baskins purchased two reduced fare tickets on United Airlines for $516 each, which were comprised of $477.76 for air transportation and $38.24 for Federal transportation tax. The tickets were subject to a 25% penalty for cancellation. When the Baskins cancelled their tickets, they were assessed a penalty of 25% of the total ticket price for each ticket. The Baskins brought a class action suit claiming that United breached its contract

when it retained $9.56 for each ticket by improperly calculating the 25% penalty on the total fare, rather than solely on the air transportation portion of the fare. The trial court granted defendant's motion to dismiss, finding that plaintiffs' claim related to rates and was preempted under section 1305(a)(1) of the ADA. The Baskins appealed and their appeal was consolidated with Johnson's appeal since both cases involve the issue of whether plaintiffs' breach of contract actions were preempted by section 1305(a)(1) of the ADA.

Section 1305(a)(1) of the ADA provides in pertinent part that:

> "[N]o State or political subdivision thereof * * * shall enact or enforce Any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of an air carrier * * *." (49 U.S.C. § 1305(a)(1) (1988).)

In *Morales v. Trans World Airlines, Inc.* (1992), 504 U.S. ——, ——, 119 L. Ed 2d 157, 167, 112 S. Ct. 2031, 2037, quoting Blacks Law Dictionary 1158 (5th ed. 1979), the Supreme Court noted that the ordinary meaning of the words "relating to" is a broad one, that is, " 'to stand in some relation; to have bearing or concern; to pertain; refer; to bring onto association with or connection with.' " The Court compared the language in section 1305 to a similarly worded preemption provision in the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. § 1144(a)(1988)) which preempts State laws that "relate to any employee benefit plan." The Court adopted the same liberal construction applied in ERISA cases and held that State enforcement actions having a "connection with or reference to airline 'rates, routes, or services' are preempted under section 1305(a)(1)." *Morales*, 504 U.S. at ——, 119 L.Ed at 167-68, 112 S. Ct. at 2037.

Applying this test, the *Morales* Court determined that State regulation of allegedly deceptive airline rate advertisements related to rates and was therefore preempted by section 1305(a)(1). Despite this ruling, the Court explained that not all State claims are preempted by section 1305(a)(1) and that State laws against gambling and prostitution as applied to airlines are not preempted. The Court also declined to address whether State regulation of the non-price aspects of fare advertising, such as State laws preventing obscene depictions, would similarly relate to rates. The Court noted that some State actions may affect airline fares in too tenuous, remote, or peripheral a manner to have preemptive effect. The *Morales* Court found that the fare guidelines at issue there did not present a borderline question, and therefore expressed no opinion as to "where it would be appropriate to draw the line" regarding the types of actions that would be preempted by section 1305(a)(1). (*Morales*, 504 U.S. at ——, 119 L.Ed. 2d at 172, 112 S.Ct. at 2040.) Lastly, the court stated that its decision did not "give the airlines *carte blanche* to lie and deceive consumers; the [Department of Transportation] retains the power to prohibit advertisements which in its opinion do not further competitive pricing." *Morales*, 504 U.S. at ——, 119 L. Ed. 2d at 172, 112 S. Ct. at 2040; see 49 U.S.C. App. § 1381 (1988).

The facts in the instant case present an even more compelling basis for preemption than did the facts addressed by the Court in *Morales*. In *Morales* the preempted State law claims concerned, among other things, advertising of limitations on refunds. Here, the State law claims attack not merely the advertising on limitations on refunds, but the limitations themselves.

In *Statland v. American Airlines* (7th Cir. 1993), 998 F.2d 539, the Seventh Circuit decided a case with facts virtually identical to those presented here. The plaintiff

in *Statland* bought an airline ticket carrying a 10% cancellation penalty. When plaintiffs cancelled the ticket, American Airlines kept 10% of the Federal tax plaintiff had paid, in addition to 10% of the ticket price. Plaintiff filed a class action suit which contained State law claims alleging breach of fiduciary duty, violation of the Consumer Fraud Act, conversion and breach of contract, based on the airline's retention of 10% of the Federal tax. The court found it "obvious that cancelled ticket refunds relate to rates" and that under *Morales* and section 1305 (a), plaintiff's claims were preempted since States cannot regulate American's refund practices either by common law or by statute.

Similarly, in *Vail v. Pan Am Corp.* (1992), 260 N. J. Super. 292, 616 A.2d 523, plaintiffs brought an action alleging fraud or consumer fraud, and breach of contract, claiming that the airlines falsely advertised that they were initiating an enhanced security program, then charged $5 per ticket to defray the costs of the program when in fact the airline did not provide such a program. The court noted that if plaintiff's State claims were allowed, this would result in multiple and potentially conflicting standards controlling airline advertising, services and rates. The court therefore determined that under the broad interpretation given to section 1305 by *Morales,* plaintiff's claims challenged rates and services and were preempted.

Based on the *Morales* Court's broad interpretation of the term "rates," and the manner in which *Statland* and *Vail* have interpreted *Morales,* we are thoroughly convinced that plaintiffs' claims relate to rates. Although plaintiffs claim that if we find preemption here, then all State claims will be preempted, a similar argument was made and rejected in *Morales.* The plaintiffs' claims do not require us to address a borderline preemption question. Rather, the State law claims here clearly relate to the rates charged by airlines for reduced fare tickets.

Furthermore, to allow plaintiffs to bring these State law claims would create exactly the type of rate inconsistency among States which Congress intended to prohibit by enacting the Federal preemption language of section 1305 (a)(1).

Recently, in *Wolens v. American Airlines, Inc.*, the Illinois Supreme Court considered whether plaintiffs' suit alleging breach of contract, and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, based on American's retroactive modification of its frequent flyer program, was preempted by section 1305(a)(1). (Illinois Supreme Court, May 1993, No. 71418.) The court in *Wolens* found that plaintiffs' suit did not relate to rates, routes, or services of an airline since a frequent flyer program is not an essential element to the operation of the airline.

On April 4, 1994, the United Supreme Court granted *certiorari* of *Wolens*. (*Wolens v. American Airlines Inc.*, (United States Supreme Court, April 4, 1994, No. 93-1286). Regardless of whether the Supreme Court finds that *Wolens* has been correctly decided, that decision would have no effect on the instant case, since the issue here is more closely connected to rates.

Lastly, we note that our decision does not leave plaintiffs without a remedy. If plaintiffs wish to pursue their claims, they may file a claim with the Department of Transportation, which has been specifically designated by Congress to administer and enforce consumer protection law. 49 U.S.C. App. § 1381 (1988); see *Statland v. American Airlines, Inc.*, 998 F.2d at 542.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

MURRAY, P.J. and COUSINS, J., concur.

APPENDIX B

[Entered May 26, 1994]

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

No. 1-93-1156
1-93-1214

ARTHUR JOHNSON, individually and on behalf of all other persons similarly situated,
Plaintiff-Appellant,

v.

AMERICAN AIRLINES, INC.,
Defendant-Appellee.

BERNARD BASKIN and MARILYN BASKIN,
Plaintiffs-Appellants,

v.

UNITED AIRLINES, INC.,
Defendant-Appellee.

ORDER

Upon consideration of petition for rehearing filed by plaintiffs-appellants,

IT IS HEREBY ORDERED that said petition for rehearing is DENIED.

/s/ [Illegible]
Justice

/s/ [Illegible]
Justice

/s/ [Illegible]
Justice

APPENDIX C

[Entered October 6, 1993]

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT/SECOND DIVISION

93-1214

BERNARD BASKIN and MARILYN BASKIN,
Plaintiff/Appellant

vs.

UNITED AIRLINES, INC.,
Defendant/Appellee

Appeal from the Circuit Court of Cook County, Illinois
County Department—Chancery Division

86 CH 9085

Honorable Lester D. Foreman, Judge Presiding

ORDER

This cause coming to be heard on the plaintiff's Motion To Consolidate And For Combined Briefing Schedule, the Court being advised in the premises;

IT IS ORDERED:

The plaintiff's Motion To Consolidate And For Combined Briefing Schedule is:

X Granted.

— Denied.

So Ordered:

/s/ [Illegible]

/s/ [Illegible]

/s/ [Illegible]

/s/ [Illegible]

APPENDIX D

77475

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

October 6, 1994

Mr. Jerome E. Boyle
Attorney at Law
33 North LaSalle St., Ste 3000
Chicago, IL 60602

No. 77475—Arthur Johnson, Indiv., etc., respondent, v. American Airlines, Inc., et al., respondents (Bernard Baskin et al., etc., petitioners). Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 28, 1994.

APPENDIX E

IN THE SUPREME COURT OF ILLINOIS

No. 77475

ARTHUR JOHNSON, INDV., ETC.,
Respondent

v.

AMERICAN AIRLINES, INC., *et al.*,
Respondents

(BERNARD BASKIN *et al.*, ETC., *petitioners*)

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85 CH 12888
86 CH 9085

1-93-1156
1-93-1214

ORDER

This matter has come for consideration upon the motion of petitioners to stay the mandate of this Court pending appeal or application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed pending the filing of a notice of appeal or an application for *certiorari* or the expiration of the period within which said application or notice may be filed. If *certiorari* is applied for or notice of appeal filed, the mandate of this Court shall, upon proof of such

filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such application or appeal. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or *certiorari* may be sought.

[Filed Oct. 18, 1994]

/s/ [Illegible]
Justice
Supreme Court of Illinois

APPENDIX F

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

No. 86 CH 9085
Hon. Lester D. Foreman

BERNARD BASKIN and MARILYN BASKIN, individually and on behalf of all persons similarly situated,
Plaintiffs,

v.

UNITED AIRLINES, INC.,
Defendant.

ORDER

THIS MATTER COMING BEFORE THE COURT on the Motion of United Airlines to Dismiss the Third Amended Complaint, due and proper notice having been given, the parties having filed written memoranda of law, the Court hearing argument of counsel and being duly advised of the premises:

IT IS HEREBY ORDERED that consistent with this Court's findings and discussions as set forth in the record hereof, that this Court hereby grants United Airlines' Motion to Dismiss the Third Amended Complaint, with prejudice and that the Third Amended Complaint and the causes of action set forth therein shall be and are hereby dismissed with prejudice.

IT IS HEREBY FURTHER ORDERED that this is a final Order resolving all matters before the Court and

this Court finds no just reason to delay enforcement or appeal of this Order.

Entered this 19th day of March, 1993.

ENTER

/s/ Lester D. Foreman
LESTER D. FOREMAN
Judge

[Entered Mar. 19, 1993]

APPENDIX G

[Filed April 13, 1993]

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

No. 86 L 9085

BASKIN,

Plaintiff,

VS.

UNITED,

Defendant.

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause before the Honorable Lester Foreman. Judge of said court, on the 19th day of March, 1993, at the hour of 2:00 o'clock p.m.

* * * *

[2] MR. TIBBLE: Douglas Tibble here on behalf of United Airlines, defendant and movant.

MR. COHEN: Good afternoon, Your Honor, Edward Cohen on behalf of the plaintiff.

MR. TIBBLE: Your Honor, this comes before the Court on our motion to dismiss the third amended complaint filed in this cause. The matter was fully briefed and is here, I believe, for argument and, hopefully, ruling this afternoon.

MR. COHEN: Your Honor, this has been before you once before. You may recall there were extensive arguments. This matter was before you previously on defendant's motion to dismiss. At that time you did grant leave

to file an amended complaint, and we did, in fact, file an amended complaint, which we believe comports to Your Honor's previous ruling.

As counsel for the defendant has stated that there have been extensive briefs and arguments on this case, at this time plaintiff would suggest to the Court that we would rest on our briefs; however, are, in fact, willing to give further argument and answer any questions that Your Honor may have.

[3] THE COURT: Counsel.

MR. TIBBLE: Your Honor, we don't waive the opportunity to summarize the arguments for the Court. We'd like an opportunity to do so. If the Court is prepared to rule without that—

THE COURT: I am prepared to hear you, gentlemen.

MR. TIBBLE: I will spend a few minutes, if I may, Your Honor. As indicated, Your Honor, this comes before the Court on our motion to dismiss the third amended complaint filed by the plaintiff in this cause. It's their fourth opportunity since 1986 to file a cause of action for which relief can be granted.

The issue before the Court today, Your Honor, arises from certain statutory language contained in the Airline Deregulation Act of 1978. Since we have argued this before, I think it is important just to go back to the language of that Act.

That Acts provides that no state shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes or services [4] of any air carrier. Subsequent to that—

THE COURT: I think to get right to the, as they say, right to the quick, go right to the jugular, the problem here is that the plaintiff takes the position that you don't understand what they're attempting to accomplish because they talk about this penalty, as your client asserts it, is applied against the tax, as well as the actual

transportation charge. And on that basis, they say that it really isn't something that effects a rate.

Now, I am not inventing that, and I don't say that in a depreciating fashion, but if you remember what he says in one of his submissions, he said that the defendant misapprehends their cause of action. Do you remember that?

MR. TIBBLE: I remember that, Your Honor.

THE COURT: So in other words, I am not inventing this, I am just in a way I am being an egotist because I am trying to show that you I have read the pleadings.

MR. TIBBLE: Your Honor, I believe the Court read the pleadings, and I think if you read [5] the pleadings, what they say in their brief is not what their pleading says.

Their pleading says, and I'll cut to that, Judge. Count 1, breach of contract, and then subtitled breach of promise. Count 2, breach of contract, unenforceable penalty on tax. Count 3, breach of contract, unenforceable penalty.

Your Honor, what this lawsuit is about is about the rates provided by United for classification of tickets. The Vail Case, which we cited, Your Honor, goes right to that issue.

THE COURT: That's a New Jersey case.

MR. TIBBLE: That's the New Jersey Appellate Court case that came out after Morales, of course. And in the Vail Case, the court there said—Let me just quote it quickly.

THE COURT: That's the case that had $5 service charge.

MR. TIBBLE: $5 service charge on the ticket, you're right, Your Honor. Let me just find the quote from Vail because I think that's instructive. In Vail the court says, "the conclusion is inescapable that Congress intended to reject the dual enforcement of state law claims [6] relating to rates and services and to vest the Federal Department of Transportation with the exclusive author-

ity to regulate and adjudicate allegations of deceptive and fraudulent advertising and practices in the airline industry."

What they're alleging, despite what they think—they're telling you they're alleging is somehow this rate structure was wrong, fraudulent, deceptive, applied wrong. In Vail, that's exactly what the Court—

THE COURT: He says they're not applying it on the rate. You're applying it on the tax.

MR. TIBBLE: That's not what they allege though, Your Honor. They allege there's a contract to pay a certain amount for air fare, and that the contract was breached, and that more was withheld than the penalty or it was breached because we withheld the penalty.

Count 2, Your Honor, says the whole penalty on unenforceable contract provision. And as Judge Hourinane ruled on a similar case to this—

THE COURT: By the way, I find that very entertaining. It's really very entertaining to [7] me. In fact, I mentioned it to some lawyers in an argument this morning. When you go to Hourihane, you tell him what Foreman said. When you come to Foreman, you tell him what Hourihane said. I got more fun out of reading the transcript. You're making Hourihane think he better do what Foreman does. Your making Foreman think he better do what Hourihane does. What we ought to do is—I would want to even recommend that Hourihane and I sit en banc on this case so you cannot whipsaw us one again the other.

MR. TIBBLE: What may be interesting about that, Your Honor, is the only connection between those cases is the same plaintiff's counsel. I am not whipsawing anyone.

THE COURT: There's no question in the transcript that you submitted to me there, listen. Judge, you know what Foreman said in these cases.

MR. TIBBLE: I take it that Judge Hourihane made a decision on what he thought the law was, and I take it that this Court will make a similar decision on what this Court thinks the appropriate law is.

THE COURT: Right.

[8] MR. TIBBLE: The crux of this is, if you read their third amended complaint, it's a breach of contract claim. That's exactly what it is. That's exactly what Vail and what Morales says the state courts are not to decide on a piecemeal basis state by state.

The Airline Deregulation Act provides a mechanism, as shown in Vail, to resolve this with the Department of Transportation. That's where it should be brought. That's the broad preemption language, and the ADA says that's what should happen with it.

Your Honor, every case cited since then is consistent with it. The Supreme Court struck down the West Decision that we indicated. The Supreme Court struck down the Illinois Supreme Court decision in Wolens that varied with the Morales position.

Your Honor, we have an explicit preemption provision that the Supreme Court said is as broad as it can be, as broad as the ERISA preemption. We have a statute that provides a remedy, and that's an exclusive remedy.

There's no cause of action they can [9] allege here, and they certainly don't allege any cause of action that's different than the breach of contract claim in Vail and the breach of contract claim purportedly alleged in Wolens and in West and in Morales. They're at the end of the rope at this point. There's nothing they have pled.

When we were here last time, they promised they were going to plead a breach of trust case, and I can refer you to that language. It was a breach of trust regarding taxes that belonged to the United States Government that were not paid to the Government. That's not in this pleading. It's the same pleading we have had three times. It's got more paragraphs. It's the same claim.

We think that the case—that the motion should be granted and that the third amended complaint should be dismissed with prejudice.

THE COURT: Counsel.

MR. COHEN: I do take exception to defendants analysis. A clear reading of the complaint, it is sufficiently different than the—

THE COURT: Counsel, I think that the problem you have here is, as counsel says, the preemption here is exceedingly broad.

[10] MR. COHEN: If I may, Your Honor.

THE COURT: Go ahead. How are you going to get around that.

MR. COHEN: I don't think that Morales is to be interpreted to preempt every single situation regarding the airline industry. The way defendant reads that, under no circumstances could a passenger or an individual ever sue the airlines because every single situation will involve rates, routes or services.

I cannot believe that if you pay for a ticket to be provided air transportation, and you get to the gate of United and you say, here is my ticket; I am going to fly, and they say no, we're not going to honor that ticket, good-bye. I cannot believe that the Supreme Court in Morales says, well, you have civil cause of action. You have no private cause of action. They're going to say, well, that has to do with services. They are going to provide you service. I don't think it's to be interpreted that broadly, and I think the Supreme Court even said that they do not intend to preempt the whole field under every situation. And if I may—

[11] THE COURT: Counsel, let's say I agree with that. But let's say that I agree with the fact that there may be some circumstances under which you could have a situation where, perhaps, the preemption won't apply, but thank goodness I am not required to decide every conceivable, potential consequence. I have to deal with this specific situation with regard to this 25 percent on this

particular type of a ticket arrangement. And the question is, am I dealing with a rate situation.

MR. COHEN: Absolutely not, Judge. They could charge whatever rate they want. We are not contesting the rate. Let them charge what they want. Let them agree to whatever they want. Let them contract to whatever they want. Obviously we cannot contest that, and that probably would be preempted.

If you want to get down to it, we're contesting the calculation, their addition, their subtraction, their multiplication, how they improperly calculated the penalty. We don't care if they charge a penalty. They're entitled to charge a penalty, and that was the contract. But the contract was clear that the penalty was on the [12] fare. Now they are collecting a tax in trust for the U.S. Government. It's not theirs; it's the governments. And there is no new agreement to charge a tax—a penalty upon that tax. They went ahead.

We're not contesting the fares or anything like that. They just went ahead and calculated a penalty upon a tax, having absolutely nothing to do with their fares. They got the penalty on the fare. We don't contest that aspect of it. We couldn't. Morales is clear on that. It is limited to the tax that they collect in trust, which is properly pled in our complaint. And they just had no basis for that, Judge. And it has obsolutely nothing to do with rates, fares or services.

THE COURT: Counsel, when you charge this—when you make the calculation against the tax, is it your position that the tax is a part of the fare?

MR. TIBBLE: Your Honor, that goes to the evidence, but that would be—if we got to the evidence, that's exactly what it is. The tariff or the regulation, the contract or the agreement, or [13] whatever they want to call it, but certainly the regulation we publish is that word fare does not mean transportation cost. It means the ticket price. That's what it was—

THE COURT: Even though it includes the tax?

MR. TIBBLE: That's right, Your Honor. If you look in the advertisement in the paper, when it says fare to Florida $99, when you go to that window, you pay $99. You don't pay 99 plus tax.

MR. COHEN: If I may respond.

MR. TIBBLE: This isn't the case that's pled here. That's not what—We're talking about evidence. But when you go to that word fare, that's what they use it for in that instance. If we get to the evidence situation, that's the kind of evidence that would be there. That's the very thing that Morales tells us the Congress does not want to have happen on a state-by-state basis. They don't want the regulation where one state says, when you say fare, you must mean that fare. Another state says, when you say fare, you must include the tax because it would be misleading to tell people, fare to Florida $99, and when they [14] come to buy the ticket, you say it's $99 plus tax.

That's exactly what the purpose of deregulation was. That's exactly the purpose of 1305 A-1 was to prevent that. That's the theme that runs through Morales. It runs through Vail. That's the reason why West was reversed, and that's the reason why Wolens was reversed because it ran contrary to that theme.

If I might just finish, Your Honor, the cases we do have to look at do support the broad preemption. Morales, of course, had to do with advertising and the regulation of advertising, among other things, including what a State could say and what would be appropriate in a particular state to say about this type of discount fare, how it needed to be advertised, or the appropriate way.

The West vs. Northwest Airlines, Your Honor, was over booking. That was reversed by the Supreme Court. Wolens had to do with the frequent flyer. That was reversed under Morales. Vail vs. Pan Am, of course, is the $5 security, and the Johnson Case before Judge Hourihane was the same as here.

[15] But, Your Honor, the other point I want to make is, you and I read the pleadings. I don't think counsel did. If I can just quote their pleading to you. This is Count 2, and it's Paragraph 12. "In calculating the penalty, they improperly and in breach of contractual agreement between the parties assessed a penalty on the federal tax." That's a breach of contract.

MR. COHEN: Which was collected in trust by the defendant.

MR. TIBBLE: That's a breach of contract. That goes right to our route. That goes right to our fare, our rate. If that's our rate, he's saying we cannot do it because it's a trust. That goes right to the issue of what an appropiate rate is. Can a penalty be based on what numbers and what amount. That's the whole concept of the rate.

Count 3, Paragraph 9 on Page 11, "the 25 percent penalty having no relationship to the defendant's damages in being improperly imposed as penalty for non-performance of the plaintiffs is unenforceable at law." That goes right to the rate. It's not their particular calculation claim [16] they're crying about. That says you may not have a penalty there.

And it goes on because the law abhors a penalty. He may be telling you one thing, but that's not what they're pleading. And that's not what they have pleaded since 1986.

MR. COHEN: I would like to respond to that.

MR. TIBBLE: Moreover, even if the issue was calculation, what number was appropriate to put in the multiplicand when I apply my percentage to that, that's the very heart of the determination of a rate. That's exactly what Morales said we're not going to allow the states to re-regulate in the Airline Deregulation Act.

What number goes in that multiplicand when you determine the penalty or service charge at a refund, that's the heart of rates, Your Honor. That's what this case is about, and that's what every case that anyone has cited in any of these briefs tell you it's about.

They haven't cited one case to the contrary. The one they have is reversed by the Supreme Court, specifically reversed.

[17] THE COURT: Counsel.

MR. COHEN: With respect to that penalty provision where the law abhors penalty, counsel has taken that out of context. That's a separate and distinct cause of action, and that's in a separate count. It has nothing to do with —That's a separate claim as opposed to the way they applied the penalty on the tax. That's number one.

Number 2, Judge, I know this isn't an evidentiary hearing, but for your information, Judge, at the time that the cause of action arose, and this was in our previous pleadings and it was in our motion prior to today, at that time, the defendant filed a tariff. And that tariff, Judge, specifically said with respect to this ticket, Mr. Baskin's ticket, that the fare is the amount of transportation and does not include the tax.

Now, subsequently they amended their tariff. But at the time this arose, the tax was separate and distinct.

Vail is distinguishable, Judge. We are not challenging the fare. We're not challenging any advertising. We're not challenging anything other than the fact that they imposed a [18] penalty on the tax. In Vail—

THE COURT: Counsel, let me ask you. If the Court wanted to say that the preemption only applies specifically to what you could say is allocated only to the fare that is charged for the transportation service, wouldn't the Vail case have been an easy case in which the Court could have said that because they can say, wait a minute, this $5 service charge, what's that got to do with flying on the airline. What's that go to do with the transportation between one point and a destination. This is a charge that's being charged for purpose of affording security. What's it got to do with transportation? This is for the protection of the passengers when they're on the ground.

MR. COHEN: This was a charge that was asserted by the airlines. It was part of the agreement that they would

charge this, and, therefore, it's part of the airlines fare and nobody has a problem with it, and Vail clearly says that Wolens applies.

THE COURT: It has nothing to do with the movement between one point and the destination. [19] What is the $5 charge that's being made for affording an enhancement of security on the ground got to do with air transportation?

MR. COHEN: If it is part of their ticket, and if it is part of the agreement with the public and the passenger that it is included in the fare, then it's part of the fare. It's totally distinguishable from our situation where we have an agreement to pay whatever the airline wants to charge. We have an agreement to pay a penalty on the fare. That is part of their fare, and we have no problem with that.

There's no authority whatsoever for them to go ahead and start charging penalties upon a tax that is to be remitted to the government that they are collecting in trust. That is the distinction. It has—That penalty on the tax has absolutely nothing to do with their fare. It's never stated as fare. It's never agreed to as a fare. It's never represented to the public as a fare. And that's the distinction, Judge.

THE COURT: Well, it is represented to the public as a fare.

MR. COHEN: No.

[20] THE COURT: Because you get that lump sum.

MR. COHEN: No, you don't, Judge. If you look at the ticket, it specifically says fare. It specifically says tax, and then it says, total. And their tariff that they filed says that the tax isn't part of the fare. The tax is separate and distinct, collected in trust for the government. There's a big distinction. And every single ticket issued by the defendant segregated the tax from the fare.

THE COURT: What about that?

MR. TIBBLE: Your Honor—

THE COURT: Is there a breakdown on the ticket with regards to what—

MR. TIBBLE: No question there's a breakdown on the ticket. Again, we're getting to the evidence, which isn't before the Court. No question there's a breakdown so United knows what portion of the fare or the amount it determines goes to the government. No question about that.

My statement before was, Your Honor, and there's an issue here as to whether we have a contract because there is a motion for summary [21] judgment that the Court didn't have to rule on before. The question is, Your Honor, and what I said before is the representations made to the public about what it costs, what the fare is to go someplace is that total amount upon which we applied that percentage. It's the fare plus tax. Well, we say the fare to Florida on the ticket, there's no question. We have never doubted that, though it hasn't come before the court that it's broken down, but in the publications to the public, upon which I guess, if there's a contract here, someone will testify I relied on, he will say, when I looked in the paper it was $100 to Florida, it was actually $92 plus $8 tax, but we advertise $100 to Florida. When he saw 25 percent of fare, that's what the penalty was.

But I think, Your Honor, Vail is very instructive for this Court. Because as the court pointed out in Vail, the court had the opportunity to say, this is a promise made that I will give you enhanced security. It's not part of the fare. It's for something else. I am going to put a surcharge on of $5 to provide you this service. And in Vail the Court even said, they [22] didn't give it to them. They lied to the public. They misled them. They breached the contract. You want to call it whatever you want. They didn't get the security they charged the public for, but the court said there that Morales is so broad that that's even contained in the preemption of Morales.

Here, Your Honor, the thing we're talking about here, assume it to be true that they're pleading that was represented the multiplicand would be the net fare, we apply the 25 percent to the amount, less tax. That's what we told them. Let's assume that to be true. That's even more closely related to what the fare was, what the cost to fly and what you get back if you canceled your tickets is then a $5 surcharge for ground security. That's the heart of the fare.

That's why I think, Your Honor, Morales is so instructive that says—Vail is so instructive that—Morales is so encompassing that even a surcharge that has nothing to do with transportation is preempt.

MR. COHEN: One last thing, Judge.

THE COURT: Yes, sir.

[23] MR. COHEN: Final closing argument. At Page 171 of Morales, the Supreme Court takes pains to state that there are certain aspects that they will not regulate in the airline industry where the issue is either too remote or tenuous to fares. And they say in this case, as in Shaw, which is another airline case, the present litigation plainly does not present a border line question, and we express no views about where it would be appropriate to draw the line. Counsel is suggesting that every situation is preempted.

THE COURT: I don't think he said every situation. He's talking about this situation. I am willing to rule with regard to this situation.

MR. COHEN: Okay.

THE COURT: What he's doing is he's calling upon —What he's doing is he's calling upon other precedents as an example of how far the courts have gone.

MR. COHEN: I understand. But you'll notice, Judge, that the Supreme Court didn't overrule or reverse Wolens. They vacated it and sent it back to the Illinois Supreme Court.

THE COURT: They certainly didn't lend [24] their approval to it either, did they.

MR. COHEN: They didn't say that this is clearly a situation where preemption applies, but they didn't do that.

THE COURT: If they were going to feel that the preemption didn't apply, they could have really come forward and said so, and they didn't do that.

Counsel, I have relived my life a second time in this case. I have gone back through it again. And I just have not seen anything take place that has caused me to change my position from the last time I visited this case.

And I say this for the record, I have a strange quirk about reviewing matters, and sometimes it's a criticism that lawyers can make when they think a judge is faced with, let's say, a motion for reconsideration. I perhaps give a motion for reconsideration more concern than I do the initial consideration because I want to rethink the matter.

And, frankly, I think I have tried in this case to find some justification in my mind for sustaining your cause of action because, first [25] of all, I am sympathetic with the fact that you have been fighting this case since 1986, and maybe I am really doing you a favor because when I rule against you today, I am really giving you an opportunity to, so to speak, cut the cord and go on to three wiser men than myself because, as I view it, and this is perhaps where if I am wrong, this is where I'm going wrong, I view this preemption under this statute, under this airline deregulation situation as being exceptionally broad. And I can't see where in a situation such as the one that I am confronted with which deals with the ticket price and the price for transportation, and irrespective of the fact that there's this breakdown with regard to tax and how much is for the transportation, in my heart of hearts, I believe that when they enacted this preemption, they were talking about situations that involved this type of activity.

They can't foresee every conceivable circumstances that's going to arise, but I don't think, and I guess this is really

the gravamen of my decision, I don't think that I can carve out this situation and say this is a situation which is [26] an exception to the preemption because I just don't think this is what they meant.

Now, maybe as I said before, maybe three wise men will say, well, maybe your argument is with regard to this issue with regard to the tax. And maybe you can sell that to some court because it has some cogency to it, but I think that when you're talking about airline deregulation and you're talking about the government's involvement in the airline industry, I think you're talking about them painting this activity with a broad brush, and I think they're talking about guys like me staying away from involving themselves in litigation that involves this type of activity.

Maybe I am looking at it too broadly. Generally I think I am a narrow minded person, but I just think with regard to this airline deregulation, they were talking about matters involving the airlines, matters involving ticket price, matters involving concerns of this nature.

And it just seems that this Vail Case is a strong influence upon me because it seems to me that if it was the kind of a situation where [27] they were saying, we're talking about air transportation, we're talking about ticket prices, we're talking about what the ticket says, we're talking about movement through the air from one place to another, and here is a situation where the Vail Case would be a better case in your case.

In the Vail Case, they could have said, wait a minute, what are you talking about; this has got nothing to do with air transportation; this has got nothing to do with what we're charging people from to move from one place to another; this is for their security, and on top of it, they didn't even get. What do they do? They say preemption applies. I just think it's—I think I am doing you a favor in this respect. There's no one, no one in this building more conscious of the principle that I am not to dismiss a cause of action with prejudice unless I

am convinced that under no set of facts could the plaintiff be entitled to its remedy. And I think we have reached that point in this case because I don't know what more you can tell me. I don't know what more you can plead. I don't know what more you can allege that would suggest that the preemption not [28] apply because I just am convinced that it's broad enough to take in.

You cannot change the facts. We know what Mr. and Mrs. Baskin did. It's there. The facts can't change. And I don't think that my appraisal or attitude or interpretation of this Section 1305 A-1 is going to change. So I think that there's a point in which I have to bite the bullet and say I am going to dismiss this case with prejudice. And let's go and see what an Appellate Court is going to say.

It's silly for you to be repleading and repleading. If this is a cause of action and it's a good cause of action, I am sorry to have to put the plaintiffs through the expense, but I wouldn't be honest with myself if I didn't do that. I can't just say a cause of action is there because somebody filed one. I don't believe in it. Motion to dismiss with prejudice is sustained.

MR. TIBBLE: Thank you.

MR. COHEN: Thank you, Judge.

APPENDIX H

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS

No. 85 CH 12888

Judge Hourihane

ARTHUR JOHNSON,

pltff.

v.

AMERICAN AIRLINES, INC.,

deft.

ORDER

This cause coming on defendant American Airlines, Inc.'s motion for summary judgment, the parties receiving notice and the Court having been advised in the premises:

IT IS ORDERED that defendant's motion for summary judgment is granted for the reasons stated by the Court during hearing on this date; this order is final and appealable, there is no just cause to delay enforcement or appeal.

[Entered Feb. 23, 1993]

ENTER:

/s/ John Hourihane
Judge

APPENDIX I

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

No. 85 CH 12888

JOHNSON,

Plaintiff,

vs.

AMERICAN AIRLINES,

Defendant.

REPORT OF PROCEEDINGS had in the above entitled cause, before the Honorable JOHN N. HOURIHANE, one of the judges of said Division, on the 23rd day of February, 1993.

* * * *

[2] THE CLERK: Johnson -v- American Airlines.

THE COURT: This matter is before the Court for a ruling on the motion for summary judgment that has been filed in this matter by the defendant.

The Court reviewed all of the pleadings that have been filed in this matter with regard to the motion for summary judgment.

The Court has reviewed the transcripts and depositions that have been filed, and the case law that has been cited. This is the third amended class action complaint. It's filed in two counts.

Count 1 is for breached of an oral contract. Plaintiff contends that the penalty for cancellation of an airline

ticket was 25 percent of the fair, less the taxes. Whereas, the defendant in this matter calculated the penalty on the total price of the tickets including the taxes.

Plaintiff seeks an accounting of all monies retained by defendant in excess of the penalty or service charge defendant was entitled to assess; judgment for the excess sums of plaintiff's distribution fees and costs.

Count 2 alleges that the inclusion of taxes in the calculation of the cancellation penalty was [3] intended to penalize and deter plaintiff from cancelling, and as such constitutes a forfeiture or penalty which is unenforceable at law.

The plaintiff seeks an accounting of "of all sums. Strike that.

Plaintiff seeks an acocunting of all, "Sums of money which were federal transportation taxes retained as part of a percentage penalty or service charge." The defendant moves for summary judgment on three separate grounds.

One, preemption by the Airlines Deregulation Act of 1978, the ADA in 49 USC 1305A1, as interpreted by the United States Supreme Court in Morales -v- Trans World Airlines, Number 90-1604, decided on June 1, 1992.

Two, defendant has not retained any portion of the tax. There was no cognizable cause of action for a tax refund. This is strictly within the Federal Purview. Section 7422 of the IRS Code provides exclusive remedy for obtaining a tax refund.

Three, a service charge is not an unenforceable penalty as a matter of law. Purveyors of tickets are not required by law to refund the purchase price of an advanced purchase ticket when the purchaser [4] later opts not to attend the event, Richman -v- Chicago Bears Football Club, 127, Ill. App. 3rd, 75.

Under any reading of the Morales Decision, it is apparent that common law actions for breach of contract are preempted by the ADA or Airline Deregulation Act.

Morales expressly extended presumption beyond State

Government enforcement actions to all state law claims relating to inter alia limitations on airline rates.

The Supreme Court analogized the broad preemptive sweep of the ADA to that accorded ERISA. Particularly in Pilot Life Insurance Company -v- Dedeaux, 481 US 41, in which the Supreme Court held that a common law contract action seeking damages for the failure of employee benefit plan to pay benefits "related to" employee benefit plans and was preempted by ERISA.

Plaintiff cites the Illinois Supreme Court decision in Wolens -v- American Airlines, 147 Ill 2nd 367, is misplaced.

The rationale under which Wolens was decided, that 1305A-1 preemption extends only to State laws specifically directed to airlines was rejected by [5] the U.S. Supreme Court, who in an order issued October 5, 1992, vacated the Wolens Decision and remanded it for reconsideration in light of the Morales decision.

Count 2 was similarly based on breach of contract theory, specifically that involving liquidated damage clauses, as such, was also pr_empted by Morales.

Further review of the rationale and discussion of the Appellate Court in Vail -v- Pan Am, 616 Atlantic, 2nd 523, is very compelling and supportive of my decision in this case.

The motion for summary judgment is granted.

THE COURT: Thank you, very much. Just prepare an order incorporate my ruling with the findings.

Would you please identify yourselves for the record?

MR. BOHRER: My name is David Bohrer, B-o-h-r-e-r. I'm one of the counsels for American Airlines.

MR. PELTON: Russell Pelton also representing American Airlines.

MR. COHEN: Edward Cohen on behalf of the plaintiff.

MR. BOYLE: Jerry Boyle on behalf of the [6] plaintiff.

THE COURT: Thank you, very much.

MR. PELTON: Can we bring in a written order tomorrow setting out the findings of fact and conclusions, showing counsel first?

MR. BOYLE: Your Honor, that can oftentimes become a difficult matter.

THE COURT: It is probably easier to find that I'm granting summary judgment for reasons that I have stated of record.

MR. BOYLE: Thank you.

MR. PELTON: Fine.

THE COURT: Just incorporated it that way.

(Which were all the proceedings had.)

FEB 6 1995

No. 94-1170

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

ARTHUR JOHNSON, individually and on behalf of all persons similarly situated,
Petitioner,

v.

AMERICAN AIRLINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District

BRIEF FOR RESPONDENT UNITED AIRLINES, INC. IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether this Court should grant certiorari to review the trial court's decision that petitioners Bernard and Marilyn Baskin's claim, alleging that United Airlines, Inc.'s discount ticket rate imposing a service charge on ticket refunds constitutes an unenforceable penalty as a matter of Illinois law, is preempted by § 1305(a)(1) of the Airline Deregulation Act of 1978.

LIST OF PARTIES PURSUANT TO SUPREME COURT RULES 24.1(b) AND 29.1

Petitioners Bernard Baskin and Marilyn Baskin brought suit against respondent United Airlines, Inc. Although entitled a class action, no class was ever certified.

United Airlines, Inc. is a wholly owned subsidiary of UAL Corporation.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

No. 94-1170

ARTHUR JOHNSON, individually and on behalf of all persons similarly situated,
Petitioner,

v.

AMERICAN AIRLINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District

---

BRIEF FOR RESPONDENT UNITED AIRLINES, INC. IN OPPOSITION

Respondent United Airlines, Inc. respectfully requests that this Court deny the Petition for Writ of Certiorari filed by Petitioners Bernard Baskin and Marilyn Baskin.

STATEMENT OF JURISDICTION

United accepts petitioners' jurisdictional statement. United shall address petitioners' arguments only as they relate to the *Baskin* litigation.

STATUTES INVOLVED

This appeal involves application of the following provision of the Airline Deregulation Act of 1978:

§ 1305 Federal preemption

(a) Preemption

(1) Except as provided in paragraph (2) of this subsection, no State of political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

49 U.S.C. App. § 1305(a)(1) (1978).

The following statute and regulation are also discussed:

§ 1381 Methods of competition; incorporation by reference

(a) The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall

order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

(b) Any air carrier may incorporate by reference in any ticket or other written instrument any of the terms of the contract of carriage in interstate and overseas air transportation, to the extent such incorporation by reference is in accordance with regulations issued by the Board.

49 U.S.C. App. § 1381 (1978).

14 C.F.R. § 253.7 Direct notice of certain terms.

A passenger shall not be bound by any terms restricting refunds of the ticket price, imposing monetary penalties on passengers, or permitting the carrier to raise the price, unless the passenger receives conspicuous written notice of the salient features of those terms on or with the ticket.

14 C.F.R. § 253.7

STATEMENT OF THE CASE

Bernard Baskin and Marilyn Baskin ("petitioners") sought recovery of funds retained as a service charge by United Airlines, Inc. ("United") from the refund paid to petitioners after petitioners cancelled their tickets for air transportation. Petitioners purchased discount tickets which were subject to a service charge on cancellation, and the gravamen of petitioners' Third Amended Complaint was that United's retention of a service charge from their refund, in whole or in part, was an unenforceable penalty under the law of Illinois.

After allowing petitioners to replead their cause of action several times over six years, the Honorable Lester D. Foreman of the Circuit Court of Cook County,

Chancery Division, dismissed the Third Amended Complaint with prejudice, holding that the claims alleged were preempted by the Airline Deregulation Act of 1978, as interpreted by the United States Supreme Court in *Morales v. Trans World Airlines, Inc.*, 504 U.S. ___, 112 S. Ct. 2031 (1992). The Illinois Appellate Court, First District, upheld the trial court's decision. On October 6, 1994, the Illinois Supreme Court denied the Baskins' petition for leave to appeal and the present Petition for Writ of Certiorari followed.

A. Statement of Facts - *Baskin v. United Airlines, Inc.*

On September 23, 1986, petitioners filed their Class Action Complaint for Accounting and Other Relief.[1] Petitioners alleged that in May, 1985 they purchased two reduced fare tickets for air transportation on United. The tickets were subject to the application of a 25% service charge on any refund in the event of cancellation. Thereafter petitioners cancelled the tickets and sought a refund. The refund paid to petitioners by United was reduced by the 25% service charge retained by United. The total amount petitioners allege to be in dispute is $9.56. These basic facts remained constant throughout petitioners' many attempts to replead their cause of action in the trial court.

On November 5, 1986, the trial court allowed petitioners to amend their complaint to allege that their purported agreement with United regarding the imposition of a service charge was oral. On August 30, 1989 petitioners filed their Second Amended Complaint, alleging breach of the purported oral contract and that

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[1] Despite its pendency since 1986, and its prior pendency as *Baskin v. United Airlines*, 85 CH 12889 (Circuit Court of Cook County, IL 1985) (removed to U.S. District Court for N.D. IL., dismissed, remanded, and non-suited), no class was ever certified in almost nine years of litigation.

the imposition of the service charge constituted an unenforceable penalty under Illinois law. On September 11, 1992 the Court dismissed petitioners' Second Amended Complaint, holding that the causes of action were preempted by §1305(a)(1) of the Airline Deregulation Act of 1978. Petitioners filed their Third Amended Complaint on October 16, 1992.[2]

The factual allegations of the Third Amended Complaint are the same as those alleged in the prior dismissed complaints. Petitioners claim that following their cancellation of the tickets, United improperly retained $9.56 from each ticket refund due to United's improperly imposed and calculated service charge. (Appendix to Brief in Opposition, p. 4a, ¶¶ 14-19) Count I of the Third Amended Complaint was styled "Breach of Contract (Breach of Promise)" (Appendix to Brief in Opposition, p. 2a); Count II "Breach of Contract (Unenforceable Penalty on the Tax)" (Appendix to Brief in Opposition, p. 7a); and Count III "Breach of Contract (Unenforceable Penalty)." (Appendix to Brief in Opposition, p. 11a) Although each count was titled differently, the factual allegations and legal basis were identical: the service charge provision of United's discount ticket fare (rate) was unenforceable as a matter of Illinois law because the imposition of a service charge, in whole or in part, constituted an unenforceable penalty in Illinois.

United filed its motion to dismiss the Third Amended Complaint on December 22, 1992. Notwithstanding petitioners' numerous attempts to replead their cause of action and their use of descriptive labelling, after briefing and oral argument Judge Foreman again held that the scope of §1305 was sufficiently broad to preempt petitioners' alleged claims. Judge Foreman granted

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[2] Appendix to Brief in Opposition, pp. 1a-14a.

United's motion to dismiss and dismissed petitioners' Third Amended Complaint with prejudice. (petitioners' Appendix F, pp. 13a-14a)

On April 22, 1994 the Illinois Appellate Court, First District, citing this Court's opinion in *Morales v. Trans World Airlines, Inc.*, 504 U.S. ___, 112 S. Ct. 2031 (1992), affirmed the lower court's decision. The appellate court stated:

> The facts in the instant case present an even more compelling basis for preemption than did the facts addressed by the Court in *Morales*. In *Morales* the preempted State law claims concerned, among other things, advertising of limitations on refunds. Here, the State law claims attack not merely the advertising on limitations on refunds, but the limitations themselves.

(petitioners' Appendix A, p. 4a) The Illinois Supreme Court denied the Baskins' petition for leave to appeal on October 6, 1994. (petitioners' Appendix D, p. 10a)

B. The Impact of *Wolens*

On January 18, 1995, this Court issued its opinion in *American Airlines v. Wolens*, ____ U.S. ____, 1995 WL 15047 (U.S. January 18, 1995), which clarified the Court's prior decision in *Morales* relating to § 1305 preemption. Although decided prior to the *Wolens* opinion, the trial court's dismissal of the Third Amended Complaint and its affirmance by the Illinois Appellate Court is consistent with this Court's opinions in *Wolens* and *Morales*, as well as Congress' expressed intent when enacting § 1305. As discussed in further detail below, petitioners' claim, that Illinois law renders United's imposition of a service charge on refunds unenforceable, is preempted by § 1305, like the National Association of Attorneys General guidelines found preempted in *Morales* and the Consumer Fraud and Deceptive Trade Practices Act count found

preempted in *Wolens*. The petition does not present a case where petitioners ask the Court to interpret the language of an alleged agreement between the parties, but rather a case where petitioners seek to use Illinois law to render that portion of United's rate which imposed a service charge on refunds unenforceable. Petitioners' attempt to apply Illinois law to attack United's rate creates the very patchwork of state re-regulation of air carriers which Congress sought to prevent through § 1305(a)(1).

ARGUMENT

The Petition for Writ of Certiorari involves application of the preemption provision of the Airline Deregulation Act of 1978 ("ADA") to a state law claim. The main thrust of petitioners' Third Amended Complaint was that the portion of United's rate which imposed a service charge on refunds constituted an unenforceable penalty under Illinois law. Like the Consumer Fraud and Deceptive Trade Practices Act count which this Court held was preempted by § 1305 in *Wolens*, petitioners' claim sought to apply Illinois substantive law to render United's rate unenforceable.

This case is factually dissimilar to the type of breach of contract claim that would be permitted by this Court's decision in *Wolens*. Unlike contract interpretation issues that this Court held would not be preempted in *Wolens*, the issues in the present case fall squarely within the *Morales* guidelines, as petitioners do not merely seek to enforce or interpret "privately ordered obligations," *Wolens*, 1995 WL at * 6, accepted by the parties.[3]

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[3] Although *Wolens* determined that breach of contract claims seeking only to interpret and enforce an air carrier's self-imposed contract terms are not preempted, it did not determine whether the particular contract claim in issue avoided preemption, as the matter was remanded for further proceedings.

I. THE ILLINOIS COURT PROPERLY APPLIED FEDERAL LAW, EVEN AS INTERPRETED BY *WOLENS*, TO DISMISS THE THIRD AMENDED COMPLAINT

Section 1305(a)(1) of the ADA provides that "[n]o state . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier . . . ." 49 U.S.C. App. § 1305(a)(1).[4] The provision was enacted as part of landmark legislation dismantling federal regulation of airline rates and providing that, henceforth, those rates would be determined by free competition among the airlines. In *Morales*, the United States Supreme Court held that the express preemption language of § 1305 is to have the broadest construction, and affirmatively interpreted § 1305 preemption to include circumstances such as those faced in this litigation. *See Morales*, 112 S. Ct. at 2032. The Court adopted the broad preemption standard applied under the Employee Retirement Income Security Act of 1974, as delineated in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 105 S. Ct. 2380 (1985) and *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S. Ct. 1549 (1987) to hold that § 1305(a)(1) preempts *any* state-law claim having a "connection with or reference to" airline rates, routes or services. *Morales*, 112 S. Ct. at 2037. After *Morales*, Congress approved this Court's interpretation, "the conferees do not intend to alter the broad preemption interpretation adopted by the Supreme Court in *Morales* . . . ." H. R. Conf. Rep. No. 103-677, p. 83 (1994).

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[4] In 1994 Congress amended §1305(a)(1), now codified as 49 U.S.C. §41713, to read "related to price, route, or service", 49 U.S.C. Pub. L. No. 103-272, 108 Stat. 1143 (July 5, 1994), without intending to change the substance of §1305 preemption. *See* H. R. 103-180, 103d Cong. 2d Sess. (1994).

Although the Court's decisions in *Morales* and *Wolens* show that the confines of federal preemption may not always be clear, the dismissed litigation, as the Illinois Appellate Court recognized, did not present a close question. Petitioners' claim that the imposition of a service charge is an unenforceable penalty under Illinois law, falls squarely within the ambit of § 1305 preemption as interpreted in *Morales* and refined by *Wolens*.

A. Petitioners' Claim Relates To United's Rate

As noted in *Wolens*, the first step in any analysis of ADA preemption is to determine whether the challenged activity relates to the airline's rates, routes or services. *Wolens*, 1995 WL at * 4. The *Wolens* court rejected the Illinois Supreme Court's distinction between essential and nonessential airline functions, a distinction which the Illinois Supreme Court used to classify the frequent flyer changes as nonessential, and therefore not preempted. *Id.* This distinction is irrelevant to the present case. Petitioners' claim, contesting United's imposition and calculation of its cancellation service charge on reduced fare tickets, indisputably has a "connection with or reference to" United's rate, as recognized by the Illinois Appellate Court. *See Morales*, 112 S. Ct. 2031, citing *Pilot Life*. The Court in *Wolens* needed little discussion to support its conclusion that the frequent flyer programs, which have less of a relationship to rates than the cancellation refund service charge imposed by United, clearly related to an air carrier's rate. *Wolens*, 1995 WL at * 4.

B. The Trial Court Properly Held Petitioners' Claims Preempted Under *Morales* and *Wolens*

The trial court's application of § 1305 preemption to dismiss petitioners' complaint was correct and consistent with this Court's decisions in *Morales* and *Wolens*. Through their Third Amended Complaint, petitioners sought to impose Illinois substantive law to render United's discount ticket rate unenforceable, much like the plaintiffs in *Wolens* sought to do with their consumer fraud count. Like the preempted consumer fraud count in *Wolens*, petitioners' claim does not rely on the terms offered or accepted for the contract of carriage, but rather the Illinois law which prohibits enforcing "penalties" for contract non-performance. The parties did not negotiate the enforceability of United's imposition of a service charge on any cancellation refund, rather it was part of the rate United established for the discount tickets, the part of United's rate which petitioners sought to render void through the imposition and enforcement of Illinois law. If not preempted, the imposition of Illinois law on United's rate would result in state-imposed patchwork regulation of airline fares.[5]

The lower court properly interpreted § 1305 to enforce the intent of Congress while not precluding all breach of contract claims against air carriers, reading § 1305 consistent with the interpretation later endorsed by this Court in *Wolens*. Since the thrust of petitioners' complaint was a state law attack on United's rate, and not to seek an interpretation of the parties' contract terms, *Morales* mandated preemption, as would this Court's

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[5] Due to the interstate nature of airline travel, an air carrier's ability to offer discount tickets would be curtailed or eliminated by a state's determination that the retention, imposition, or calculation of a service charge on refunds following cancellation constituted an unenforceable contract penalty. *See Morales*, 112 S. Ct. at 2039-2040.

decision in *Wolens*. The lower court's dismissal of the Third Amended Complaint is consistent with *Wolens* and does not preclude breach of contract claims like those which the Court in *Wolens* said avoided preemption. It also would not preclude other claims against airlines which lower courts have held not to be preempted. *See Hodges v. Delta Airlines, Inc.*, 4 F.3d 350 (5th Cir. 1993), *rehearing en banc granted*, 12 F.3d 426 (5th Cir. 1994) (personal injury claim), and *West v. Northwest Airlines, Inc.*, 995 F.2d 148 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 603 (1994) (compensatory damages for overbooking).

Similarly, the decision of the lower court did not foist on the United States Department of Transportation the responsibility for resolution of all claims brought against an airline. While the DOT may not be an appropriate forum for the resolution of disputes regarding interpretation of an air carrier's self-imposed contract terms, *Wolens*, 1995 WL at * 7-8, it remains an appropriate forum for investigating, preventing, and eliminating unfair or deceptive practices by air carriers, including ticket rates which improperly impose a service charge on refunds.[6] Congress' charge to the DOT in § 1381,[7] to investigate and prevent unfair or deceptive practices of air carriers, does not require the creation of any apparatus to resolve private contract disputes, nor does it channel into federal courts the business of resolving disputes arising from privately ordered

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[6] DOT regulations implicitly approve air carrier rates which impose limitations on passenger refunds. "A passenger shall not be bound by any terms restricting refunds of the ticket price, imposing monetary penalties on passengers . . . unless the passenger receives conspicuous written notice of the salient features of those terms on or with the ticket." 14 C.F.R. § 253.7.

[7] Now codified as 49 U.S.C. 41712 (1994). *See Wolens* 1995 WL 15047 * 15 N.2.

obligations between an air carrier and its passengers. *Wolens, 1995 WL at* * 7-8.

II. PETITIONERS' MISCHARACTERIZATION OF THEIR CLAIM IN AN ATTEMPT TO AVOID FEDERAL PREEMPTION MUST FAIL

Petitioners seek to avoid the application of § 1305, as interpreted by *Morales* and *Wolens*, by characterizing the issue presented in their Petition as whether "airlines and passengers enter into enforceable ticket contracts . . . ." (Petition, p. i) This generalized question is answered affirmatively in *Wolens*. An airline can be held liable for its contracts so long as state law or policies are not imposed to enhance or enlarge the contractual duties undertaken by the air carrier. *Wolens*, 1995 WL at * 5. This question is irrelevant to the present case, however, as the nature of the petitioners' claim differs substantially from the type of breach of contract claim addressed by the Court in *Wolens*, and mirrors the consumer fraud claim which the Court in *Wolens* found preempted by § 1305(a)(1).

A. Petitioners Claim that the Cancellation Service Charge is Unenforceable as a Matter of Illinois Law and is Preempted by § 1305

The gravamen of all three counts of the Third Amended Complaint is that the service charge imposed by United on petitioners' refund is unenforceable under Illinois law. Petitioners' own allegations show their intent to use Illinois law to attack United's rate, as does the nature of their class action allegations:[8]

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[8] As evident by petitioners' failure to obtain class certification in over nine years of litigation, a claim requiring interpretation of an alleged oral contract would not lend itself to class certification as each class member would have to prove the privately ordered obligations of

(continued...)

COUNT I
Breach of Contract
(Breach of Promise)

. . . .

13. In the event the Plaintiffs did not use their tickets and requested a refund, the Defendant had a duty to return the $38.24 federal transportation tax which Defendant held in trust, regardless of any other agreement regarding the disposition or allocation of the fare. [Appendix to Brief in Opposition, p. 3a]

. . . .

COUNT II
Breach of Contract
(Unenforceable Penalty on Tax)

. . . .

15. The 25% penalty on the tax, having no relationship to Defendant's damages and being solely imposed as a penalty for non-performance of the Plaintiffs, is unenforceable at law as the law abhors a penalty. [Appendix to Brief in Opposition, p. 9a]

. . . .

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[8] (...continued)
his own contract, whereas a claim that Illinois law renders United's rate unenforceable regardless of the terms of the parties' contract because it imposes a penalty, is more amenable to class certification.

COUNT III
Breach of Contract
(Unenforceable Penalty)

. . . .

> 9. The 25% penalty having no relationship to Defendant's damages and being imposed as a penalty for non-performance of the Plaintiffs, is unenforceable at law as the law abhors a penalty. [Appendix to Brief in Opposition, p. 12a]

The legal theory of each count of the Third Amended Complaint is that United's rate for the discount tickets, to the extent it allowed United to impose a service charge on any refund, was unenforceable as a matter of Illinois law. Petitioners do not seek an interpretation of the private ordered obligations of their purported oral contract with United, but rather a declaration that under Illinois law United's rate was illegal and unenforceable.

> This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach of contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement.

Wolens, 1995 WL at * 8. The Court cited with favor the United States' statement in its Brief for United States as Amicus Curiae in *Wolens* that: "[s]ome state-law principles of contract law . . . might well be preempted to the extent they seek to effectuate the State's public policies, rather than the intent of the parties." *Wolens*, 1995 WL FN8 at * 17. The petitioners' claim exceeded the confines imposed on state courts by § 1305 and impermissibly sought to apply external Illinois law and public policies to render the service charge unenforceable and enhance their agreement with United.

This application and enforcement of Illinois law on United's rate is exactly the nature of the action held preempted by *Wolens*. *Wolens* noted that, "the Illinois Consumer Fraud Act serves as a means to guide and police the marketing practices of the airlines; the Act does not simply give effect to bargains offered by the airlines and accepted by airline customers," *Wolens*, 1995 WL at * 6, and as such, the claim was preempted by § 1305(a)(1). Similarly, petitioners here seek a determination that Illinois law renders the claimed bargain illegal, and not simply a ruling to give effect to the terms of the parties' agreement. Any reversal of the trial court's decision would enable Illinois law to guide and police the marketing practices of an air carrier, and effectively regulate United's rate by prohibiting the imposition of service charges on ticket refunds, at least in Illinois. Thus, plaintiffs' claims are preempted by § 1305 as interpreted by both *Morales* and *Wolens*.

B. The Court's Fact-Based Decision That The Complaint Involves Rates (*Morales*), Not Contract Terms (*Wolens*), Should Not Be Reviewed

The trial and appellate courts' application of § 1305 to dismiss the Third Amended Complaint rested on the determination that the claims alleged did not involve the mere interpretation of the parties' private ordered obligations, but rather the imposition of Illinois law on United's discount ticket fare (rate) to render it unenforceable regardless of the alleged terms of the parties' oral contract. The crux of petitioners' claim is not an issue of contract interpretation, the type of breach of contract count *Wolens* held would not be preempted. Petitioners seek a finding under Illinois law that United's rate was unenforceable. The dismissal of the Third Amended Complaint was consistent with *Morales* and the distinction drawn by this Court in *Wolens*.

Similar results have been reached by other courts reviewing similar claims which were styled as breach of contract actions, but which were really direct attacks on an airline's rate. Although all decided prior to *Wolens*, their outcomes, if not their rationale, are consistent with this Court's ruling in *Wolens*. A "common law breach of contract claim" was specifically rejected by a New Jersey court following *Morales*, when it held that § 1305(a)(1) preempted the claim which sought to use New Jersey law to obtain a refund of charges assessed by an airline as part of its ticket price. In *Vail v. Pan Am Corp.*, 260 N.J. Super. 292, 616 A.2d 523 (N.J. Super. Ct. App. Div. 1992), plaintiffs contended that the airline's imposition of a five dollar per ticket charge as part of its ticket price in order to defray the costs of an enhanced airport security program was unenforceable as a matter of state law, as the enhanced security program was never implemented. *Id.* at 524. The *Vail* court held that *Morales* was dispositive in the alleged "breach of contract" case, since the five dollar charge "at the very least, indirectly relates to the 'rates' charged by an air carrier." *Id.* at 526. The court noted the difficult conflict of law questions which would arise from the application of the laws of different states to claims resulting from an airline's national or international campaigns. *Id.* at 526 n. 3. The "breach of contract" claim in *Vail*, like the consumer fraud claim in *Wolens*, did not involve interpretation of the parties' agreed contract terms, but impermissibly sought to apply state law to render that portion of the air carrier's rate which assessed the five dollar charge unenforceable.

Similarly, claims almost identical to those raised by petitioners were held preempted by the Seventh Circuit Court of Appeals in *Statland v. American Airlines, Inc.*,

998 F.2d 539 (7th Cir.), *cert. denied*, 114 S. Ct. 603 (1993).[9] The petitioner in *Statland* alleged that she purchased an airline ticket with a ten percent cancellation penalty. When she cancelled the ticket, American Airlines retained ten percent of the ticket price, including both the transportation charge and federal tax. *Id.* at 539. The Seventh Circuit held that Statland was not entitled to raise a private cause of action under §411(b) of the Federal Aviation Act. *Id.* at 541. The Court then addressed Statland's four state law claims which had been dismissed by the lower court for a lack of supplemental jurisdiction. *Id.* at 541. The Seventh Circuit stated:

> Statland's state law claims are for breach of fiduciary duty, violation of the Illinois Consumer Fraud and Deceptive Practices Act, conversion and breach of contract. The conduct she complains of is the same for each claim, however: she protests American's practice of withholding 10 percent of the federal tax on cancelled tickets. We think it is obvious that canceled ticket refunds relate to rates. Under *Morales* and 49 U.S.C. § 1305(a), states cannot regulate American's ticket refund practices either by common law or by statute. This sweeps aside Statland's state law claims.

Id. at 541-52 (emphasis added). Although decided before *Wolens*, the *Statland* court's ruling is consistent with the distinction drawn by *Wolens*: a "breach of contract" claim which seeks to impose state law to render an airline's rate, or part of its rate, unenforceable, is preempted by § 1305.

---

[9] This Court's recent denial of the Petition for Writ of Certiorari in *Statland*, where review of the same issue was sought, alone should be a sufficient basis to deny the pending petition.

III. DENYING THE PETITION IS CONSISTENT WITH THIS COURT'S OPINION IN *WOLENS*

Petitioners' attempt to divert this Court's attention by arguing that the trial court's decision mandates a return to "the law of the jungle" or to "Robber Baron piracy" is disingenuous. (Petition, p. 7) The contention is both untrue and irrelevant. This case does not present a borderline question. *See Morales*, 112 S. Ct. at 2040. Neither is a determination of whether the ADA preemption is "total" or "minimal" required. *See Wolens*, 1995 WL at * 7. The present claims clearly fall within the federal preemption as delineated by *Morales*. In fact, any decision other than that reached by the trial court would result in a confusing tapestry of state law regulation of air carrier rates. As noted in *Morales*, differing state law determinations would have a significant impact on the fares charged by airlines. *Morales*, 112 S. Ct. at 2040.

Further, the trial court's decision, when read in conjunction with *Morales* and *Wolens*, would neither unduly burden the Department of Transportation in its enforcement functions nor leave petitioners without a remedy if an airline's rate includes an unenforceable or illegal service charge. The Airline Deregulation Act of 1978 empowers the Department of Transportation to investigate unfair trade practices in the air transportation industry. See 49 U.S.C. App. § 1381. To the extent a discount ticket rate which includes the imposition of a service charge on a passenger's refund constitutes an unfair or improper practice, the DOT retains jurisdiction to prohibit such fare provisions and order appropriate remedial measures. The Airline Deregulation Act of 1978 vests any remaining authority to regulate air carrier rates with the DOT, not to multiple and possibly conflicting state law resolution. Any other result could end with United's service charge on refunds being

unenforceable in Illinois but enforceable in other states, or enforceable in part in some states with differing portions enforceable in other states. This is the very result Congress intended to avoid by § 1305, an intention which this Court affirmed and endorsed in *Morales* and *Wolens*.

CONCLUSION

For the above reasons, Respondent United Airlines, Inc. respectfully requests that this Court deny the Petition For Writ of Certiorari and grant United such other relief as may be just.

Respectfully submitted,

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APPENDIX

APPENDIX

[Filed October 16, 1992]

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

No. 86 CH 9085
Hon Lester D. Foreman

BERNARD BASKIN and MARILYN BASKIN,
individually and on behalf of all
persons similarly situated,
Plaintiffs,

v.

UNITED AIRLINES, INC.,
Defendant.

THIRD AMENDED CLASS ACTION COMPLAINT FOR ACCOUNTING AND OTHER RELIEF

Now come the Plaintiffs, by and through their attorneys, Alvin W. Block and Associates, and for their Third Amended Class Action Complaint against the Defendant, state as follows:

COUNT I
BREACH OF CONTRACT
(Breach of Promise)

1. Plaintiffs are residents of Cook County, Illinois.

2. Defendant is a foreign corporation registered to do business in Illinois with its principal place of business in Cook County, Illinois.

3. On or about May 6, 1985, the Plaintiffs purchased two tickets in Chicago, Illinois, from the Defendant for round trip air transportation between Chicago and Las Vegas, Nevada. The scheduled date for departure was August 22, 1985.

4. Plaintiffs paid the sum of $477.76 for the air transportation fare plus the additional sum of $38.24 for the federal air transportation tax, as designated on the face of the tickets, referenced in ¶ 3 above. Attached hereto as exhibit #1 is a copy of Plaintiff's ticket coupons.

5. The federal air transportation tax collected by Defendant in the amount of $38.24 was collected, in trust, in a fiduciary capacity.

6. The federal air transportation tax collected by Defendant in the amount of $38.24 is a tax assessed by the government for air travel, when a passenger actually flies, not a tax on writing an airline ticket.

7. The federal transportation tax is the responsibility and obligation of the passenger, and Defendant only acts as a collector and escrowee of the federal transportation tax.

8. Defendant, in its dealings with its passengers and travel agents, and in preparing its accounting records and

tax returns, segregates the fare charged and the federal transportation tax and treats the two categories separate and distinctly.

9. The fare and the transportation tax are separately itemized and treated differently on defendant's tickets and its reporting forms, since taxes are collected, in trust by the defendant, to be paid to the government if the passenger actually travels by air, or to be returned to the passengers if they do not travel by air.

10. Defendant directs its own employee's and travel agents to segregate the fare from the federal transportation tax. Defendant pays commission to travel agents on the fare only and pays no commission on the federal transportation tax. Attached hereto and incorporated herein as exhibits #2 through #5, are exemplary copies of documents provided by Defendant to its passengers which clearly illustrate the separation of the fare charged and the federal transportation tax assessed.

11. The tickets purchased by the Plaintiffs were subject to a penalty of 25% of the fare for any cancellation or alteration.

12. By purchasing the tickets, Plaintiffs agreed to the terms of the defendant's ticket contract, including the fares charged by defendant and the provision that imposed a 25% penalty on the fare.

13. In the event the Plaintiffs did not use their tickets and requested a refund, the defendant had a duty to return the $38.24 federal transportation tax which defendant held in trust, regardless of any other agreement regarding the disposition or allocation of the fare.

14. Prior to the scheduled departures, Plaintiffs cancelled their reservations and requested a refund from the Defendant.

15. Pursuant to the terms of the ticket contract, the 25% penalty on the plaintiff's fares equalled the sum of $119.44.

16. The Defendant assessed an aggregate penalty against the Plaintiffs in the sum of $129.00, calculated as a $119.44 penalty on the fare and a $9.56 penalty on the federal transportation tax, and issued a refund or charge card credit for the balance.

17. In calculating the penalty, the Defendant improperly and in breach of the contractual agreement between the parties also assessed and collected from Plaintiffs a 25% penalty on the federal tax, which was collected in trust, totaling an amount of $9.56.

18. The penalty assessed against and collected from the plaintiff, as 25% of the federal tax, in the amount of $9.56, was not remitted to the government by the defendant.

19. The penalty assessed against and collected from the plaintiff, as 25% of the federal tax, in the amount of $9.56, was improperly retained by the defendant.

20. The penalty assessed against and collected from the plaintiff, as 25% of the federal tax, in the amount of $9.56, bears no relationship to the defendant's pricing policies and is solely an overcharge in breach of the agreement between the plaintiff and defendant.

21. The penalty assessed against and collected from the plaintiff, as 25% of the federal tax, in the amount of

$9.56, bears no relationship to the defendant's fares and is solely an overcharge in breach of the agreement between the plaintiff and defendant.

22. The penalty assessed against and collected from the plaintiff, as 25% of the federal tax, in the amount of $9.56, bears no relationship to the defendant's routes or services and is solely an overcharge in breach of the agreement between the plaintiff and defendant.

23. The penalty assessed against and collected from the plaintiff, as 25% of the federal tax, in the amount of $9.56, bears no relationship to any damages which could reasonably result from Plaintiffs' ticket alteration since taxes are collected in trust, and the refund of taxes cannot constitute a loss of revenue to the defendant.

24. It was the defendant's custom and practice to routinely assess a penalty upon the federal transportation tax on changed tickets purchased by other class members, in breach of the ticket agreement, in a manner similar to the plaintiffs.

25. As a direct result of the Defendant's actions, there are other persons who incurred a penalty, in varying percentages, on the taxes collected.

26. Plaintiffs bring this action individually and pursuant to Chapter 110, Section 2-801, Illinois Revised Statutes, as representative parties on behalf of all persons or entities who purchased tickets for air transportation subject to a penalty or service charge condition and who were assessed or paid a penalty or service charge in excess of the percentage of the fare agreed upon, the conduct alleged herein being a common course of conduct with respect to the putative class.

27. The requirements for maintenance of a class action are met in that:

a. The members of the class are so numerous, upon information and belief numbering in the hundreds of thousands, that joinder of all members of the class in this action is impracticable;

b. There are questions of fact or law concerning the imposition of the excess charges which are common to the class and which plainly predominate over any questions concerning only individual class members;

c. The representative parties will fairly and adequately protect the interest of the class, the Plaintiffs' claims being typical and the Plaintiffs' attorneys being knowledgeable and experienced in prosecuting class actions;

d. The class action is an appropriate method for the fair and efficient adjudication of the controversy, the claims being numerous, small and similar.

28. The Plaintiffs and members of the class are entitled to a refund of the wrongful penalty assessed and withheld upon the federal transportation tax.

WHEREFORE, Plaintiffs pray for relief as follows:

A. for an order determining that this case may be maintained as a class action.

B. for an order compelling the Defendant to account for all sums of money retained by Defendant which were in excess of the penalties or service charges which Defendant was entitled to charge or assess.

C. for judgment in favor of the Plaintiffs and members of the class for the excess sums disclosed by the accounting.

D. for an order formulating an orderly plan of distribution.

E. for an award of reasonable attorneys fees for counsel for the plaintiff class.

F. for costs and such other relief as may be necessary and appropriate.

COUNT II
BREACH OF CONTRACT
(Unenforceable Penalty on the Tax)

1. Plaintiffs are residents of Cook County, Illinois.

2. Defendant is a foreign corporation registered to do business in Illinois with its principal place of business in Cook County, Illinois.

3. On or about May 6, 1985, the Plaintiffs purchased two tickets in Chicago, Illinois, from the Defendant for round trip air transportation between Chicago and Las Vegas, Nevada. The scheduled date for departure was August 22, 1985.

4. Plaintiffs paid the sum of $477.76 for the air transportation plus the additional sum of $38.24 for the federal air transportation tax, as designated on the face of the tickets, referenced in ¶3 above.

5. The federal air transportation tax collected by Defendant in the amount of $38.24 was collected, in trust, in a fiduciary capacity.

6. The federal air transportation tax collected by Defendant in the amount of $38.24 is a tax assessed by the government for air travel, when a passenger actually flies, not a tax on writing an airline ticket.

7. The tickets purchased by the Plaintiffs were subject to a penalty of 25% of the fare for any cancellation or alteration.

8. In the event the plaintiffs did not use their tickets and requested a refund, the defendant was required to return the $38.24 federal transportation, tax which defendant held in trust, regardless of any other agreement regarding the disposition or allocation of the fare.

9. Prior to the scheduled departures, Plaintiffs cancelled their reservations and requested a refund from the Defendant.

10. Pursuant to the terms of the ticket contract, the 25% penalty on the plaintiff's fares equalled the sum of $119.44.

11. The Defendant assessed an aggregate penalty against the Plaintiffs in the sum of $129.00, calculated as a $119.44 penalty on the fare and a $9.56 penalty on the federal transportation tax, and issued a refund or charge card credit for the balance.

12. In calculating the penalty, the Defendant improperly and in breach of the contractual agreement between the parties also assessed a 25% penalty on the federal tax, which was collected in trust, by the defendant, totaling an amount of $9.56.

13. Taxes are collected by Defendant in a fiduciary capacity, and their refund can never constitute a loss of revenue.

14. The retention of 25% of the taxes collected by Defendant was imposed upon the Plaintiffs as a penalty for not flying and was wholly unrelated to any damages which would reasonably result from Plaintiffs' failure to fly.

15. The 25% penalty on the tax, having no relationship to Defendant's damages and being imposed solely as a penalty for nonperformance of the Plaintiffs, is unenforceable at law as the law abhors a penalty.

16. It was Defendant's custom and practice to routinely penalize other class members in a manner similar to the Plaintiffs by retaining a percentage of the tax collected in the same percentage as the penalty assessed on the fare.

17. As a direct result of the Defendant's actions, there are other persons who incurred a penalty, in varying percentages, on the taxes collected.

18. Plaintiffs bring this action individually and pursuant to Chapter 110, Section 2-801, Illinois Revised Statutes, Illinois Revised Statutes, as representative parties on behalf of all persons or entities who purchased tickets for air transportation subject to the designated tax and subject to the penalty or service charge condition and who were assessed or paid a penalty or service charge which was calculated in a manner so as to include a part or all of the federal transportation taxes collected.

19. The requirements for maintenance of a class action are met in that:

a. The members of the class are so numerous, upon information and belief numbering in the hundreds of thousands, that joinder of all members of the class in this action is impracticable;

b. There are questions of fact or law concerning the imposition of the excess charges which are common to the class and which plainly predominate over any questions concerning only individual class members;

c. The representative parties will fairly and adequately protect the interest of the class, the Plaintiffs' claims being typical and the Plaintiffs' attorneys being knowledgeable and experienced in prosecuting class actions;

d. the class action is an appropriate method for the fair and efficient adjudication of the controversy, the claims being numerous, small and similar.

20. The Plaintiffs and members of the class are entitled to a refund of any federal transportation taxes retained as part of a percentage penalty or service charge.

WHEREFORE, Plaintiffs pray for relief as follows:

A. for an order determining that this case may be maintained as a class action.

B. for an order holding that the penalty imposed upon the taxes collected is unenforceable.

C. for an order compelling the Defendant to account for all sums of money which were federal transportation taxes retained by Defendant as part of a percentage penalty or service charges.

D. for judgment in favor of the Plaintiffs and members of the class for the excess sums disclosed by the accounting.

E. for an order formulating an orderly plan of distribution.

F. for an award of reasonable attorneys fees for counsel for the plaintiff class.

G. for costs and such other relief as may be necessary and appropriate.

COUNT III
BREACH OF CONTRACT
(Unenforceable Penalty)

1. Plaintiffs are residents of Cook County, Illinois.

2. Defendant is a foreign corporation registered to do business in Illinois with its principal place of business in Cook County, Illinois.

3. On or about May 6, 1985, the Plaintiffs purchased two tickets in Chicago, Illinois, from the Defendant for round trip air transportation between Chicago and Las Vegas, Nevada. The scheduled date for departure was August 22, 1985.

4. Plaintiffs paid the sum of $477.76 for the air transportation plus the additional sum of $38.24 for the federal air transportation tax, as designated on the face of the tickets, referenced in ¶3 above.

5. The tickets purchased by the Plaintiffs were subject to a penalty of 25% of the fare for any cancellation or alteration.

6. Prior to the scheduled departures, Plaintiffs cancelled their reservations and requested a refund from the Defendant.

7. The Defendant assessed an aggregate penalty against the Plaintiffs in the sum of $129.00, calculated as a $119.44 penalty on the fare and a $9.56 penalty on the federal transportation tax, and issued a refund or charge card credit for the balance.

8. The retention of 25% of the ticket price was imposed upon the Plaintiffs as a penalty for not flying or altering their tickets and was wholly unrelated to any damages which would reasonably result from Plaintiffs' failure to fly or ticket alteration.

9. The 25% penalty having no relationship to Defendant's damages and being imposed as a penalty for non-performance of the Plaintiffs, is unenforceable at law as the law abhors a penalty.

10. It was Defendant's custom and practice to routinely penalize other class members in a manner similar to the Plaintiffs by retaining a percentage of the ticket price.

11. As a direct result of the Defendant's actions, there are other persons who incurred a penalty.

12. Plaintiffs bring this action individually and pursuant to Chapter 110, Section 2-801, Illinois Revised Statutes, Illinois Revised Statutes, as representative parties on behalf of all persons or entities who purchased tickets for air transportation subject to the designated tax and subject to the penalty or service charge condition and who were assessed or paid a penalty or service charge

which was calculated in a manner so as to include a part or all of the federal transportation taxes collected.

13. The requirements for maintenance of a class action are met in that:

a. the members of the class are so numerous, upon information and belief numbering in the hundreds of thousands, that joinder of all members of the class in this action is impracticable;

b. there are questions of fact or law concerning the imposition of the excess charges which are common to the class and which plainly predominate over any questions concerning only individual class members;

c. the representative parties will fairly and adequately protect the interest of the class, the Plaintiffs' claims being typical and the Plaintiffs' attorneys being knowledgeable and experienced in prosecuting class actions;

d. the class action is an appropriate method for the fair and efficient adjudication of the controversy, the claims being numerous, small and similar.

14. The Plaintiffs and members of the class are entitled to a refund of any federal transportation taxes retained as part of a percentage penalty or service charge.

WHEREFORE, Plaintiffs pray for relief as follows:

A. for an order determining that this case may be maintained as a class action.

B. for an order holding that the penalty imposed upon the taxes collected is unenforceable.

C. for an order compelling the Defendant to account for all sums of money which were federal transportation taxes retained by Defendant as part of a percentage penalty or service charges.

D. for judgment in favor of the Plaintiffs and members of the class for the excess sums disclosed by the accounting.

E. for an order formulating an orderly plan of distribution.

F. for an award of reasonable attorneys fees for counsel for the plaintiff class.

G. for costs and such other relief as may be necessary and appropriate.

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FILED
FEB 6 1995
CLERK OF THE COURT

No. 94-1170

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ARTHUR JOHNSON, individually and on behalf of all persons similarly situated,
Petitioner,

v.

AMERICAN AIRLINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District

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BRIEF OF RESPONDENT AMERICAN AIRLINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether petitioner Arthur Johnson's state law claim challenging the rate an airline charged for refunding a reduced price ticket is preempted by the express preemption provision of the Airline Deregulation Act of 1978.

RULE 29.1 STATEMENT

Respondent American Airlines, Inc. is wholly owned by AMR Corporation, a Delaware corporation, and owns 49% of DFW Terminal Corp., a Texas corporation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1170

ARTHUR JOHNSON, individually and on behalf of all persons similarly situated,

Petitioner,

v.

AMERICAN AIRLINES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District

BRIEF OF RESPONDENT AMERICAN AIRLINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

This case involves a breach of contract claim against respondent, American Airlines, Inc. ("American"). The claim indisputably "relates to" American's rates under the test for preemption established in *Morales v. Trans World Airlines, Inc.*, 112 S.Ct. 2031 (1992). And as pled by the petitioner, Arthur Johnson ("Johnson"), enforcement of this claim will necessarily require enforcement of state laws and policies that are external to any agreement American is alleged to have made, and thus involves "state laws" under the test established in *Wolens v. American Airlines, Inc.*, 157 Ill. 2d 466, 626 N.E.2d 205 (1993), *cert. granted*, 114 S.Ct. 1396 (1994), *aff'd in part, rev'd in part, and remanded*, 63 U.S.L.W. 4066

(Jan. 18, 1995). Accordingly, the claim is plainly preempted by section 1305(a)(1) of the Airline Deregulation Act of 1978 ("ADA"), § 41713(b)(1)(1994) (superseding 49 U.S.C. App. § 1305(a)(1)(1993))[1] and Johnson's petition for certiorari should be denied.

STATEMENT OF THE CASE

In his petition, Johnson challenges the method used by American to calculate the service charge assessed upon the refund of a reduced price airline ticket. He claims the method used by American to calculate the service charge resulted in his being overcharged $3.14.[2] Johnson purports to bring his claim on behalf of himself and all other persons similarly situated. JC. 2. However, the putative class has never been certified, and, for the reasons stated below, never will be certified.

Johnson alleges that he contacted American by telephone and purchased a reduced fare ticket for $158, comprised of $146.30 for air transportation and $11.70 for the federal transportation excise tax, 26 U.S.C. § 4261(a). JC. 118, 126. Johnson's ticket was subject to a 25 percent

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[1] In the current version of section 1305(a)(1) of the ADA, the language "relating to rates, routes, or services" is replaced by "related to a price, route, or service." This change occurred as part of a broad scheme to recodify certain provisions of Title 49 of the United States Code. Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745. The legislative history to this recodification statute reveals no intent to change the substance of the ADA preemption provision. *See* H.R. Rep. No. 180, 103d Cong., 2d Sess. (1994).

[2] Johnson erroneously states that the amount of alleged overcharge was $3.14. The actual difference between the method used by American to calculate the service charge and the method Johnson claims should have been used is $2.92. Johnson's error flows from his erroneous calculation that 25 percent of $146.30 equals $36.85. (It actually equals $36.58.) Johnson compounds his error by calculating the difference between $39.50 and $36.85 as $3.14. (It actually equals $2.65.) In any event, the amount in controversy is truly insignificant.

service charge for any refund or change in the reservation. JC. 118. Accordingly, when Johnson cancelled his reservation, American assessed a service charge of $39.50, representing 25 percent of the fare, and refunded $118.50 to Johnson. *Id.*

Johnson alleges that representatives of American orally advised him that the service charge for refunding a reduced fare ticket was 25 percent of the "fare." JC. 117, 478-479. Johnson claims American breached an alleged oral contract to assess the 25 percent service charge against the "fare," which he argues should not include the federal transportation excise tax. JC. 117-118.[3]

The trial court entered summary judgment in favor of American and against Johnson. On appeal, the Illinois Appellate Court for the First District affirmed the trial court's decision, holding that section 1305(a)(1) of the ADA preempted Johnson's lawsuit under *Morales*, 112 S.Ct. 2031. *Johnson v. American Airlines, Inc.*, 261 Ill. App. 3d 622, 633 N.E.2d 978 (1st Dist. 1994), *appeal denied*, 157 Ill. 2d 503, 642 N.E.2d 1282 (1994).

The appellate court limited its decision to whether, under *Morales*, Johnson's specific claim "related to" airline rates and thus fell within the scope of preemption under section 1305(a)(1) of the ADA. *Johnson*, 633

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[3] Third Amended Class Action Complaint For Accounting and Other Relief, filed June 6, 1988 at App. 1a-9a. Johnson's complaint alleged breach of oral contract (Count I) and that the service charge is an unenforceable penalty (Count II). Johnson abandoned Count II in the court below, however. *See* Plaintiff's Resp. to Mot. For Summ. J., p. 5 at JC. 466. ("This complaint, by its explicit terms, is a simple claim for breach of contract—nothing more, and nothing less.") In his Petition, Johnson states unequivocably that "[t]his is a case for breach of [an] airline ticket contract[]." Pet. at 3. In any event, Count II is preempted under section 1305(a)(1) of the ADA, *i.e.*, it both relates to airline rates and also requires the application of Illinois substantive law and normative policies. *See* Parts I and II of this brief.

N.E.2d at 980. The appellate court also acknowledged that this Court had granted certiorari in *Wolens*, 157 Ill. 2d 466, 626 N.E.2d 205 (1993), *cert. granted*, 114 S.Ct. 1396, *aff'd in part, rev'd in part, and remanded*, 63 U.S.L.W. 4066 (Jan. 18, 1995), and it expressly cautioned that its holding did *not* mean that *all* state law claims for breach of ticket contracts were preempted. *Johnson*, 633 N.E.2d at 980.

Johnson's claim that the appellate court's "unarticulated assumption" was that this Court would reverse the Illinois Supreme Court's decision in *Wolens* is therefore incorrect. To the contrary, the appellate court expressly found that *Wolens*, however it might be decided, would not be dispositive because under *Morales* American's airline refund policy is "more closely connected to rates" than are frequent flyer programs. *Johnson*, 633 N.E.2d at 980. The appellate court denied rehearing. Thereafter, Johnson sought leave to appeal to the Illinois Supreme Court, which was likewise denied. *Johnson*, 157 Ill. 2d 503, 642 N.E.2d 1282 (1994). Johnson then filed this petition for certiorari.

On January 18, 1995, this Court decided *Wolens*, reversing the Illinois Supreme Court's judgment to the extent it allowed survival of the plaintiffs' Consumer Fraud and Deceptive Business Practices Act claims, 815 ILCS 505/1 *et seq.* (1993), and affirming the judgment to the extent it allowed their breach of contract action to proceed. 63 U.S.L.W. at 4071. The opinion of the appellate court below is consistent with this Court's opinion in *Wolens*.

In *Wolens*, this Court held that certain contract claims remain preempted under the ADA. *Id.* at 4069-71. Similarly, the appellate court's decision in *Johnson* did not hold categorically that all contract claims are preempted. Johnson's contract claim in this case falls squarely within

the range of preemption recognized in *Wolens* and *Morales*. Johnson's breach of contract claim is also identical to the claims deemed preempted in *Statland v. American Airlines, Inc.*, 998 F.2d 539, 541-42 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 603 (1993). The petition is therefore neither one of first impression, nor will it affect anyone other than Johnson and his dispute over a grand total of $3.14. This Court's review is therefore not warranted and the petition should be denied.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. *WOLENS* DOES NOT EXCLUDE ALL CONTRACT CLAIMS FROM PREEMPTION UNDER THE ADA.

Wolens held that section 1305(a)(1) of the ADA does not preempt state "enforcement of contract terms set by the parties themselves," and therefore does not preempt contract claims "seeking recovery *solely* for the airline's alleged breach of its own, *self-imposed undertakings*," *Wolens*, 63 U.S.L.W. at 4069, or for the airline's breach of "a term *the airline itself stipulated*." *Id.* at 4070 (emphasis added). The opinion makes equally clear, however, that section 1305 *does* preempt contract claims "to the extent they seek to effectuate the State's public policies, rather than the intent of the parties." *Id.* at 4070, n.8 (quoting Brief for the United States as *Amicus Curiae* in Support of Reversal at 28, *Wolens* (No. 93-1286)). The Court stressed that "[t]his distinction between what the State dictates and what the airline *itself undertakes* confines courts, in breach of contract actions, to the parties' bargain, with *no* enlargement or enhancement based on state laws or policies *external to the agreement*." *Id.* at 4070 (emphasis added). Thus, section 1305(a)(1) "stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who *claims and proves* that an

airline dishonored a term the airline itself stipulated." *Id.* (emphasis added).[4]

As American will next show, the particular contract claim at issue in this case is plainly preempted under the test established in *Wolens* because Johnson does *not* "claim" or allege that American stipulated, understood or agreed that the federal transportation excise tax would be excluded from the "fare" when calculating the ticket refund surcharge, and because enforcement of his claim will necessarily require "enlargement or enhancement" of the bargain between the parties based on state laws or policies external to the "agreement" they allegedly made.

II. JOHNSON DOES NOT ALLEGE A CONTRACT CLAIM WHICH CAN ESCAPE PREEMPTION UNDER *WOLENS*.

The petition should fail because Johnson *does not even allege* that American stipulated, undertook or agreed to refund that portion of his ticket's price attributable to the federal transportation excise tax. Absent such an allegation, Johnson fails to meet the predicate test under *Wolens, i.e.*, that American breached a "self-imposed" undertaking which American "itself" had specifically agreed to perform. *Wolens*, 63 U.S.L.W. at 4069. Instead, Johnson alleges simply that:

> Plaintiff was then told by an employee of American that a special fare was available to him involving a

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[4] The petitioners in *Wolens* did "claim" that American had violated a self-imposed undertaking. American denied that it had ever made or agreed to the undertaking alleged in *Wolens*, and this Court therefore remanded to the state court for a determination of whether petitioners could "prove" that American had itself undertaken the obligation alleged in that case, without reliance on any state laws or policies external to any agreements American itself undertook to perform. *Id.* at 4071. The Court made clear it was expressing no view on resolution of that question. *Id.* Thus, the "claims" in *Wolens* will be preempted if the plaintiffs in that case fail to prove the existence of the self-imposed undertaking they have alleged.

> purchase deadline and a penalty of 25% of the fare for any changes or cancellations. Plaintiff accepted the offer of that fare, and an oral contract was thereby entered into.

App. at 3a, ¶ 7.

Johnson's complaint does *not* allege that American agreed or undertook to refund all of the federal transportation excise tax. Nor does the complaint allege that American agreed that the term "fare" would not include the federal transportation excise tax for purposes of calculating the service charge for a refund. Because Johnson does not allege an undertaking or a meeting of the minds concerning the meaning of the term "fare," Johnson's alleged oral contract claim cannot be resolved by the State court without enlargement or enhancement of the term "fare" based on State laws or policies external to the terms of the alleged agreement. It is, therefore, preempted under *Wolens* and *Morales* because the claim is an attack on American's method of calculating passenger ticket refunds, and hence on American's "rates," under the ADA.

A state court construing the term "fare" to exclude the federal transportation excise tax in the absence of an allegation that American agreed to that definition necessarily violates this Court's mandate in *Wolens* against imposing state substantive standards or policies with respect to contracts that relate to "rates, routes, or services" of an airline. *Wolens*, 63 U.S.L.W. at 4070. Thus, Johnson's claims are preempted squarely under *Morales* and *Wolens* and the petition should be denied.

III. THE COURT'S DECISION BELOW WAS CORRECTLY DECIDED UNDER *MORALES*.

In *Morales*, 112 S.Ct. at 1041, this Court preempted the States from enacting rules and regulations concerning the same type of claim that Johnson seeks to adjudicate in his breach of contract claim against American. The Air Travel Industry Enforcement Guidelines of the Na-

tional Association of Attorneys General at issue in *Morales*, 112 S.Ct. at 2039, required, *inter alia*, that an advertised airline "fare" include all taxes and surcharges—the precise opposite of the construction Johnson seeks here. This Court held, however, that the ADA preempted the enactment, and necessarily the enforcement, of state guidelines dictating the meaning of the term "fare." *Morales*, 112 S.Ct. at 2041. The court below recognized that there is no difference between the preemption of state guidelines defining the term "fare," as in *Morales*, and the preemption of an equivalent state law guideline defining the term "fare" in a breach of contract action. *Johnson*, 642 N.E.2d at 980. The court below correctly observed that:

> The facts in the instant case present an even more compelling basis for preemption than did the facts addressed by the Court in *Morales*. In *Morales*, the preempted State law claims concerned, among other things, advertising of limitations on refunds. Here, the State law claims attack not merely the advertising limitations on refunds, but the limitations themselves.
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> * * * *
>
> The plaintiffs' claims do not require us to address a borderline preemption question. Rather, the State law claims here clearly relate to the rates charged by airlines for reduced fare tickets. Furthermore, to allow plaintiffs to bring these State law claims would create exactly the type of rate inconsistency among States which Congress intended to prohibit by enacting the Federal preemption language of section 1305(a)(1).

Johnson, 633 N.E.2d at 979-80.

In summary, this petition involves a breach of contract claim that is preempted under section 1305(a)(1) of the ADA as construed in both *Morales* and *Wolens*. To resolve Johnson's claim, the State court would necessarily apply substantive State standards, and normative policies to construe the term "fare," an exercise of the judicial

power which this Court has previously preempted as "relating to rates, routes, or services." Moreover, the appellate court's opinion is consistent with *Morales* and *Wolens* and in this instance will not enlarge or otherwise alter the scope of the preemption doctrine as defined in the ADA or construed by this Court. Accordingly, the petition should be denied.

IV. THE DEPARTMENT OF TRANSPORTATION, NOT THE STATES, IS THE APPROPRIATE DECISION MAKER FOR JOHNSON'S CLAIM.

State court adjudication of the term "fare," in the absence of preemption, will also certainly result in multiple and conflicting standards relating to airline rates. For example, some state courts have held in other contexts that "fare" means the charge for the carriage of a passenger. *See e.g., Krause v. Pacific Mut. Life Ins. Co.*, 141 Neb. 844, 5 N.W.2d 229, 232 (1942) (interstate airline flight fare is "the rate of charge for the carriage of passengers, as approved by the proper governmental agency"); *Clark v. Southern Ry. Co.*, 69 Ind. App. 697, 119 N.E. 539, 542 (1918) (railway fare is "the rate of charge for the carriage of passengers . . . money paid for a voyage or passage"); *Philadelphia v. Philadelphia Rapid Transit Co.*, 228 Pa. 325, 77 A. 501, 503-04 (1910) (rapid transit fare is "the price of passage, or the sum paid for carrying a passenger" or "a rate of charge for the carriage of passengers"). There is widespread disagreement, however, concerning what is included in the "fare," especially when the issue is whether taxes are included. *See e.g., State ex rel. Ariz. Dept. of Revenue v. Cochise Airlines*, 128 Ariz. 432, 626 P.2d 596, 600 (1980) (air fare does not include airport head tax); *Simon v. City of New York*, 22 Misc. 2d 718, 197 N.Y.S.2d 288, 292 (N.Y. Sup. Ct. 1960) (taxi cab fare includes transportation tax); *People v. Pansmith*, 14 Misc. 2d 300, 174 N.Y.S.2d 860, 862 (N.Y. Crim. Ct. 1958) (railway fare does not include federal tax); *Santa Fe Trail Transp. Co. v. Newlon*, 195

Okla. 542, 159 P.2d 713, 714 (1945) (bus fare includes transportation tax). These state court opinions, adopting inconsistent definitions of the term "fare," illustrate precisely why a uniform federal definition of "fare" is required for the airline industry, and why this area must be federally preempted.

Leaving the definition of a "fare" to the State court is also inappropriate because DOT regulations already govern the use of the term when used by airlines in communicating with the public. Specifically, DOT's price advertising regulation provides:

> The Board considers any advertising or solicitation by a . . . carrier, or agent of [a carrier], for passenger air transportation, . . . that states a price for such air transportation, . . . to be an unfair or deceptive practice, *unless* the price stated is the *entire price* to be paid by the customer to the [carrier] . . . .

14 C.F.R. § 399.84 (1994) (emphasis added).

DOT regulations therefore require that the term "fare" *include* the federal transportation excise tax. During a House of Representatives hearing, Patrick V. Murphy, the Deputy Assistant Secretary for Policy and International Affairs of DOT, made clear DOT's intent in this regard when he testified as follows:

> First of all, *I want to point out that the 10 percent ticket tax is included in all of the fares that you see.* Whenever you see fares advertised in the media, that will include the 10 percent ticket tax. The issue here is the per passenger add-ons. Airport fees, passenger facility charges, and inspection fees at international borders are the add-ons that are usually at the bottom of the page. *So the biggest bulk, that 10 percent, is in the fare.*
>
> * * * *
>
> [Advertisements must] list the fare correctly and accurately. *Included in that fare is the 10 percent ticket tax.* Those are the fares you typically see advertised.

> *If you see a $99 fare, that is with the 10 percent Federal ticket tax included,* and that has to be an accurate fare. We also require that they note in the ad any other fees that might be applicable.

Hearing on the Airline Advertising Reform Act of 1992: Hearing on H.R. 5124 before the Subcomm. on Aviation of the House Comm. on Public Works and Transp., 102d Cong., 2d Sess. 22-36 (1992) (emphasis added).

Section 399.84 and DOT's expressed intent that the term "fare" include the federal transportation excise tax not only confirm American's position in the court below, they demonstrate that DOT, not the States, should determine what is a "fare" for purposes of an airline refund policy applied to discount fares. The airlines must not be left to deal with a balkanized patchwork of state court interpretations of the term "fare," particularly if the definitions adopted are inconsistent with DOT regulations which are binding on American under section 411 of the Federal Aviation Act, 49 U.S.C. App. § 1381. This is exactly the type of state regulation and enforcement this Court held preempted in *Morales* and *Wolens*.

The opinion and judgment below were therefore consistent with *Morales* and *Wolens* and this petition does not present new substantive questions which merit review by this Court. The petition should therefore be denied.

V. THIS CASE IS NOT OTHERWISE IMPORTANT ENOUGH TO WARRANT REVIEW BY THIS COURT.

A. This Court Recently Denied Certiorari Review Of The Same Question In *Statland*.

The question presented by this petition is not one of first impression, nor is it otherwise distinctive. This Court recently denied certiorari in a virtually identical case. *Statland v. American Airlines, Inc.*, 998 F.2d 539 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 603 (1993). In *Statland*, 998 F.2d at 539, the plaintiff purchased an

American "reduced fare ticket" subject to a 10 percent service charge for any refund. When the plaintiff refunded her ticket, American assessed the 10 percent service charge against the "fare," *i.e.*, the base price for air transportation plus the corresponding federal tax. *Id.* Statland sued American in federal court on her own behalf and on behalf of a putative class to recover the $1.25 federal transportation tax she claimed was not a part of the "fare." *Id.* Statland also sued for conversion, breach of contract, breach of fiduciary duty, and violation of the Illinois Consumer Fraud and Deceptive Practices Act, 815 ILCS 505/1 *et seq.*, as well as an implied private cause of action under the Federal Aviation Act. *Statland*, 998 F.2d at 541-42. The Seventh Circuit Court of Appeals affirmed the federal district court's dismissal for lack of subject matter jurisdiction and held that Statland's state law claims were preempted under section 1305(a)(1). *Id.* This Court denied Statland's petition for writ of certiorari. *Statland*, 114 S.Ct. 603 (1993). As in *Statland*, the issue presented here does not merit review by this Court and the petition should be denied.

B. A Minuscule Dollar Amount Is In Controversy.

Johnson seeks recovery of $3.14. The minuscule amount in issue will *not* grow because Johnson cannot prove each element necessary for certification of his putative class. For example, commonality of claims, if any, is absent. 735 ILCS 5/2-801(2) (1993). *See Rice v. Snarlin, Inc.*, 131 Ill. App. 2d 434, 266 N.E.2d 183 (3d Dist. 1970) (class denied certification where contract claims of individual members were based upon oral solicitations which therefore raised unique factual inquiry). *See also McMerty v. Burtness*, 72 F.R.D. 450, 456 (D. Minn. 1976) (putative class denied certification where contract claims of individual class members were based upon oral negotiations).

For example, even assuming Johnson could establish that each member of the class actually spoke with Amer-

ican before purchasing a reduced-fare ticket, Johnson will still be required to present facts sufficient to state a claim including but not limited to: (1) whether individual conversations were with American or one of the many independent travel agencies authorized to sell reduced fare tickets; (2) the substance of each conversation (*e.g.*, whether the class member was told that there was a service charge for refunds equal to "25% of the fare" as alleged by Johnson and whether the class member was told that the "fare" excluded the federal transportation excise tax); (3) whether the circumstances surrounding each individual conversation were sufficient to establish the existence of the alleged oral contract; (4) whether, under the circumstances, "fare" means the purchase price of the ticket or the purchase price of the ticket less the federal transportation excise tax; and (5) whether the class member relied in whole, or in part, on representations advertised in the written media.

Under Illinois law, each of these questions presents a unique question of fact on which plaintiffs normally bear the burden of proof. *Ceres Ill., Inc. v. Illinois Scrap Processing, Inc.*, 114 Ill. 2d 133, 141-47, 500 N.E.2d 1, 4-7 (1986). Because the evidence necessary to prove breach of the alleged oral contract is necessarily unique to each putative class member, no class has been or will be certified. Accordingly, the petition is of no importance except to Johnson and even to him the dispute is of marginal significance.

C. Johnson's "Road to Ruin" Theories Lack Merit.

Johnson's self-serving, exaggerated and purely speculative claims concerning the consequences for contract and personal injury claimants that allegedly flow from the appellate court's decision are without merit. First, Johnson's claim that the Illinois appellate court "effectively" preempted *all* ticket contract claims is, quite simply, not the case. Johnson's similar claim that "there will be no free market for airline tickets if airlines and passengers

cannot rely on their contracts" is likewise a gross overstatement and is unfounded. Pet. at 5. Second, this petition does *not* involve questions concerning preemption of state law claims in tort under the ADA. In *Wolens*, American did not assert, nor does it assert here, that the ADA preempts personal injury claims relating to airline operations. *Wolens*, 63 U.S.L.W. at 4070, n.7. We also note that none of the dire consequences Johnson predicts have become reality after this Court denied certiorari on nearly identical claims in *Statland*, 114 S.Ct. 603 (1993).

CONCLUSION

For all the reasons set forth above, this Court should deny the petition for writ of certiorari of Arthur Johnson.

Respectfully submitted,

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APPENDIX

3. At all times material to this action there was in effect a statute, 26 U.S.C. Section 4261, which provides in relevant part:

> (a) There is hereby imposed upon the amount paid for taxable transportation (as defined in section 4262) of any person a tax equal to 8 percent of the amount so paid.
>
> * * * *
>
> (b) . . . the taxes imposed by this section shall be paid by the person making the payment subject to the tax.

4. At all times material to this action there was in effect a statute, 26 U.S.C. Section 4262, which provides in relevant part:

> (a) . . . the term "taxable transportation" means—
>
> (1) transportation by air which begins in the United States or in the 225-mile zone and ends in the United States or in the 225-mile zone; and
>
> (2) in the case of transportation by air other than transportation described in paragraph (1), that portion of such transportation which is directly or indirectly from one port or station in the United States to another port or station in the United States, but only if such portion is not a part of uninterrupted international air transportation . . .

5. At sometime more than 30 days prior to July 8, 1985, the specific date of which is presently unknown, Plaintiff called directly to American Airlines in Chicago to make an inquiry concerning travel to New York on or about July 8, 1985. At various times prior to that call Plaintiff had seen and heard American advertisements describing low fare restricted ticket options.

6. On the occasion of the designated call the Plaintiff asked for the lowest fare and asked for any restrictions on the fare.

7. Plaintiff was then told by an employee of American that a special fare was available to him involving a purchase deadline and a penalty of 25% of the fare for any changes or cancellations. Plaintiff accepted the offer of that fare, and an oral contract was thereby entered into.

8. Defendant then mailed to the Plaintiff a ticket for travel from Chicago to New York-LaGuardia on July 8, 1985. The fare classification was QE30. The Plaintiff was charged and paid through his American Express credit card the sum of $146.30 as a fare for air transportation plus the sum of $11.70 for air transportation tax. Attached hereto as an exhibit is a copy of Plaintiff's ticket coupon.

9. The ticket which was purchased by the Plaintiff was subject to a condition that a penalty or service charge of 25% of the fare was chargeable for cancellation or alteration.

10. The Plaintiff did not travel to New York as scheduled. The Plaintiff, prior to July 8, 1985, called directly to the Defendant and cancelled his reservation.

11. On or about August 6, 1985, Plaintiff caused to be returned Plaintiff's original ticket coupons by delivering them to an American ticket office in Chicago, Illinois. A credit card refund receipt was issued to the Plaintiff's American Express account, a copy of which is attached hereto as an exhibit. In calculating the refund, an employee of the Defendant charged $39.50 as a penalty and issued a refund or credit of $118.50. In calculating the designated penalty the Defendant improperly and in breach of the contractual agreement between the parties charged a penalty not only on the fare but also on the tax.

12. Plaintiff brings this action individually and pursuant to Chapter 110, Section 2-801, Illinois Revised Statutes, as representative party on behalf of all persons or entities who purchased tickets for air transportation subject to the designated tax and subject to the penalty or service charge condition and who were assessed or paid a penalty or service charge in excess of 25% of the fare.

13. The requirements for maintenance of a class action are met in that:

a. The members of the class are so numerous, upon information and belief numbering in the hundreds of thousands, that joinder of all members of the class in this action is impracticable;

b. There are questions of fact or law concerning the imposition of the excess charges which are common to the class and which plainly predominate over any questions concerning only individual class members;

c. The representative party will fairly and adequately protect the interest of the class, the Plaintiff's claims being typical and the Plaintiff's attorneys being knowledgeable and experienced in prosecuting class actions;

d. The class action is an appropriate method for the fair and efficient adjudication of the controversy, the claims being numerous, small and similar.

14. The Plaintiff and members of the class are entitled to a refund of the wrongful excess penalty or service charges assessed or paid.

WHEREFORE, Plaintiff prays for relief as follows:

A. for an order determining that this case may be maintained as a class action.

B. for an order compelling the Defendant to account for all sums of money retained by Defendant which were in excess of the penalties or service charges which Defendant was entitled to charge or assess.

C. for judgment in favor of the Plaintiff and members of the class for the excess sums disclosed by the accounting.

D. for an order formulating an orderly plan of distribution.

E. for an award of reasonable attorneys fees for counsel for the plaintiff class.

F. for costs and such other relief as may be necessary and appropriate.

COUNT II

1. Plaintiff is a resident of Cook County, Illinois.

2. Defendant is a foreign corporation registered to do business in Illinois with its principal place of business in Illinois in Cook County, Illinois.

3. At all times material to this action there was in effect a statute, 26 U.S.C. Section 4261, which provides in relevant part:

> (a) There is hereby imposed upon the amount paid for taxable transportation (as defined in section 4262) of any person a tax equal to 8 percent of the amount so paid.
>
> * * * *
>
> (b) . . . the taxes imposed by this section shall be paid by the person making the payment subject to the tax.

4. At all times material to this action there was in effect a statute, 26 U.S.C. Section 4262, which provides in relevant part:

> (a) . . . the term "taxable transportation" means—
>
> (1) transportation by air which begins in the United States or in the 225-mile zone and ends in the United States or in the 225-mile zone; and
>
> (2) in the case of transportation by air other than transportation described in paragraph (1), that

> portion of such transportation which is directly or indirectly from one port or station in the United States to another port or station in the United States, but only if such portion is not a part of uninterrupted international air transportation . . .

5. At sometime more than 30 days prior to July 8, 1985, the specific date of which is presently unknown, Plaintiff called directly to American Airlines in Chicago to make an inquiry concerning travel to New York on or about July 8, 1985. At various times prior to that call Plaintiff had seen and heard American advertisements describing low fare restricted ticket options.

6. On the occasion of the designated call the Plaintiff asked for the lowest fare and asked for any restrictions on the fare.

7. Plaintiff was then told by an employee of American that a special fare was available to him involving a purchase deadline and a penalty of 25% of the fare for any changes or cancellations. Plaintiff accepted the offer of that fare and an oral contract was thereby entered into.

8. Defendant then mailed to the Plaintiff a ticket for travel from Chicago to New York-LaGuardia on July 8, 1985. The fare classification was QE30. The Plaintiff was charged and paid through his American Express credit card the sum of $146.30 as a fare for air transportation plus the sum of $11.70 for air transportation tax. Attached hereto as an exhibit is a copy of Plaintiff's ticket coupon.

9. The ticket which was purchased by the Plaintiff was subject to a condition that a penalty or service charge of 25% of the fare was chargeable for cancellation or alteration.

10. The Plaintiff did not travel to New York as scheduled. The Plaintiff, prior to July 8, 1985, called directly to the Defendant and cancelled his reservation.

11. On or about August 6, 1985, Plaintiff caused to be returned Plaintiff's original ticket coupons by delivering them to an American ticket office in Chicago, Illinois. A credit card refund receipt was issued to the Plaintiff's American Express account, a copy of which is attached hereto as an exhibit. In calculating the refund, an employee of the Defendant charged $39.50 as a penalty and issued a refund or credit of $118.50. In calculating the designated penalty the Defendant retained 25% of the transportation tax collected.

12. Taxes are collected by Defendant in a fiduciary capacity, and their refund can never constitute a loss of revenue.

13. The retention of taxes as part of a fare penalty is wholly unrelated to any damages which would reasonably result from Plaintiff's failure to fly.

14. The inclusion of taxes in the calculation of a penalty or service charge by Defendant was intended to penalize Plaintiff for not flying or altering his ticket or to deter Plaintiff from not flying or alter his ticket.

15. As a consequence of the facts alleged in paragraphs #12, 13, and #14, the inclusion of taxes collected in the penalty charged to the Plaintiff is a forfeiture or a penalty which is unforceable at law.

16. Plaintiff brings this action individually and pursuant to Chapter 110, Section 2-801, Illinois Revised Statutes, as representative party on behalf of all persons or entities who purchased tickets for air transportation subject to the designated tax and subject to the penalty or service charge condition and who were assessed or paid a penalty or service charge which was calculated in a manner so as to include a part or all of the federal transportation taxes collected.

17. The requirements for maintenance of a class action are met in that:

a. The members of the class are so numerous, upon information and belief numbering in the hundreds of thousands, that joinder of all members of the class in this action is impracticable;

b. There are questions of fact or law concerning the imposition of the excess charges which are common to the class and which plainly predominate over any questions concerning only individual class members;

c. The representative party will fairly and adequately protect the interest of the class, the Plaintiff's claims being typical and the Plaintiff's attorneys being knowledgeable and experienced in prosecuting class actions;

d. The class action is an appropriate method for the fair and efficient adjudication of the controversy, the claims being numerous, small and similar.

18. The Plaintiff and members of the class are entitled to a refund of any federal transportation taxes retained as part of a percentage penalty or service charge.

WHEREFORE, Plaintiff prays for relief as follows:

A. for an order determining that this case may be maintained as a class action.

B. for an order compelling the Defendant to account for all sums of money which were federal transportation taxes retained as part of a percentage penalty or service charge.

C. for judgment in favor of the Plaintiff and members of the class for the sums disclosed by the accounting.

D. for an order formulating an orderly plan of distribution.

E. for an award of reasonable attorneys fees for counsel for the plaintiff class.

F. for costs and such other relief as may be necessary and appropriate.

BLOCK, LEVY & ASSOCIATES

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No. 94-1170

In The

Supreme Court of the United States

October Term, 1994

ARTHUR JOHNSON, individually and on behalf of all persons similarly situated,

Petitioner,

v.

AMERICAN AIRLINES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court of Illinois, First District

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

> We hold that the ADA's preemption prescription bars state-imposed regulation of air carriers, but allows room for court enforcement of contract terms set by the parties themselves. *American Airlines, Inc. v. Wolens*, ___ U.S. ___, ___, 63 U.S.L.W. 4066, 4067 (January 18, 1995) (*Wolens*).

If there were any doubt that this case should be summarily reversed, this Court's holding in *Wolens* removed it. In *Wolens*, which was decided two weeks after the instant petition was filed, this Court held, in no

uncertain terms, that state courts can enforce contractual obligations voluntarily undertaken by airlines.

And this case involves nothing more (and nothing less) than an effort to hold two airlines to the contract terms offered by them, and accepted by the petitioners. In an apparent effort to confuse the issue, the respondents have taken two tactically complementary, but analytically contradictory, approaches to the instant petition.

While acknowledging that the petitioners have abandoned all claims other than the plain breach of contract claims asserted in Count I of their respective complaints, respondent American Airlines, Inc. (American) nevertheless proceeds with an analysis which blithely ignores the clear import of this Court's decision in *Wolens*. In contrast, respondent United Airlines, Inc. (United), while acknowledging the import of *Wolens*, nevertheless proceeds with an analysis which assumes that the petitioners are asserting claims long ago abandoned by them.

The respondents cannot have it both ways. There is only one claim left in both cases: the claims asserted in Count I of each complaint, which seek only to hold the airlines to the terms of the bargains struck by the parties. And there is only one legal analysis applicable to this case: this Court's holding in *Wolens*, which plainly recognizes the validity of the claims asserted here.

THIS IS A SIMPLE BREACH OF CONTRACT CASE

In light of this Court's decision in *Morales vs. Trans World Airlines, Inc.*, 504 U.S. ___, 119 L.Ed.2d 157 (1992)

(*Morales*), the petitioners long ago abandoned the liquidated damages/unenforceable penalty theories earlier asserted in Counts II and III of their complaints. Knowing this, American summarily disposes of this issue in a footnote on page 3 of its response, where it acknowledges that these claims were "abandoned." United, in contrast, has responded as if these "abandoned" claims were the *only* claims involved in the case. Nothing could be further from the truth.

Count I of each complaint alleges that the airlines made an offer, that the petitioners accepted these offers, that consideration was exchanged, and that the airlines later reneged on the contract terms agreed to by both parties. These are the only claims left in these cases. To the extent United is confused about the claims remaining in this case, petitioners reiterate that they disclaim any effort to proceed with any claim other than those which seek to hold these airlines to the rates offered by them, and accepted by the petitioners. The abandoned claims plainly are preempted. The remaining claims plainly are not[1].

---

[1] Although the petitioners' claims are simple, that is not to say they are insignificant. It should go without saying that the parties would not endure nine years of complex litigation over aggregate claims of less than $13.00. These are class actions, involving many millions of similar claims. And American's extensive discussion of the class certification issue simply does not belong in its response, since this issue has not been presented to this Court. Johnson's motion for class certification was ready for argument when the trial court, *at American's insistence*, deferred consideration of the motion pending its ruling on American's motion to dismiss. JC425, 460.

THIS CASE SHOULD BE SUMMARILY REVERSED IN LIGHT OF *WOLENS*

In *Wolens*, this Court found that the claims presented in that case "relate[d] to rates. 63 U.S.L.W. at 4069. But the Court (unlike the respondents here) acknowledged that this determination only begins the inquiry. This Court stated that the determination of whether a claim is preempted also requires an analysis of whether state court enforcement of contracts, voluntarily undertaken by airlines, amounts to the "enact[ment] or enforce[ment] [of] any law, rule, regulation, standard, or other provision having the force and effect of law within the meaning of [§] 1305(a)(1)." 63 U.S.L.W. at 4069. The Court held that a "remedy confined to a contract's terms simply holds the parties to their agreements," and does not amount to state enactment or enforcement of a law relating to rates. *Id.* According to the Court:

> The ADA's preemption clause, § 1305(a)(1), read together with the FAA's saving clause, stops States from imposing their own substantive standards with respect to rates, routes or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated. This distinction between what a State dictates and what the airline itself undertakes confines courts, in breach of contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement. 63 U.S.L.W. at 4070.

Here, as in *Wolens*, the petitioners seek only to hold the airlines to their own self-imposed obligations. Here,

as in *Wolens*, the petitioners do not seek to enlarge or enhance their claims based on any laws or policies external to the agreement of the parties. Here, as in *Wolens*, the issue is not what the State dictates, but only what the airline itself undertakes. Here, as in *Wolens*, there is no preemption.

And the respondents cannot seriously dispute this. United's peculiar focus on the abandoned claims amounts to a tacit admission that the simple breach of contract claims at issue here are not preempted. American, on the other hand, apparently refuses to accept the fact that it lost the *Wolens* case, and urges this Court to adopt the reasoning of one of the dissenting opinions in *Wolens*[2]. Indeed, American's Response reads almost as if it were intended as a petition for rehearing in *Wolens*.

But this is not a petition for rehearing. It is, rather, an effort to hold two airlines to their own self-imposed obligations. As such, the claims presented here are not preempted.

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[2] The only assertion offered by American which was not rejected by this Court in *Wolens* is its curious reliance on a regulation (14 C.F.R. § 399.84), *designed to protect consumers*, which prohibits deceptive advertising by airlines. But the fact that an airline is required to include the federal tax in its advertisement of fares has no bearing whatsoever on an agreement between the parties to a cancellation penalty of "25% of the fare." American is attempting to use a sword, which was given to consumers by the Department of Transportation, as a shield against the assertion of contract rights by consumers.

CONCLUSION

The instant case fell into the gap between *Morales* and *Wolens*. Had this Court decided *Wolens* first, this case would never have arrived here, because the courts below would not have dismissed these claims. As it is, nine years of litigation, and many millions of dollars in claims, now hang in the balance. Petitioners do not ask this Court for plenary review – such review is absolutely unnecessary in light of *Wolens*, which squarely held that claims like those asserted here are not preempted. Rather, petitioners respectfully submit that their petition should be granted, and the opinion below summarily reversed. In the alternative, the opinion below should be vacated, and remanded for reconsideration in light of *Wolens*.

Respectfully submitted,

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